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# JUDGES OF THE HIGH COURT.

*January—June, 1926.*

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## PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Patna.]

PRESENT :—LORD SHAW, LORD CARSON, SIR JOHN EDGE AND MR. AMEER ALI.

Sourendra Mohan Sinha and others ... *Appellants**

*v.*

Hari Prasad Sinha and others ... *Respondents.*

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Sourendra Mohan Sinha
*v*
Hari Prasad Sinha.

*Hindu Law—Mithila school—Mortgage of joint family property—Compound interest—Transfer of Property Act (IV of* 1882), *Ss.* 86 *and* 90—*Sonthal Parganas Regulation, III of* 1872 *(as amended by Regulation V of* 1893), *Ss.* 5 *and* 6—*Sonthal Parganas Settlement (Amendment) Regulation, III of* 1908, *S.* 5—*Notification* re *settlement in "Calcutta Gazette"—Jurisdiction of Subordinate Judge—Claim for personal decree against mortgagors—Civil Procedure Code,* 1908, *S.* 11—Res judicata.

In 1896 the adult members of a joint Hindu family, for themselves and the minor members thereof, executed a mortgage of family property in Bhagalpur (Sonthal Parganas) to secure the repayment on or before 14th March, 1903, of Rs. 3,50,000, principal money, and thereafter compound interest thereon at 7 1|2 per cent. with yearly rests.

In 1904 (when no settlement of the Sonthal Parganas had yet been made, or notified, as required by the Sonthal Parganas Regulation, III of 1872, S. 5, in the *Calcutta Gazette*) the representatives-in-interest of the deceased mortgagee instituted, before the Subordinate Judge, Bhagalpur, a suit upon the mortgage against, the then members of the joint family and others who derived title through them, claiming a decree for sale of the mortgaged property and foreclosure under Ss. 86 and 90 of the Transfer of Property Act (IV of 1882), and for "such other reliefs as may under the circumstances of the case be deemed proper may be granted," but not specifically praying for a personal decree. That suit was ultimately on appeal dismissed by the Privy Council in May, 1914, on the ground of want of jurisdiction of the Bhagalpur Court in the then circumstances by virtue of the aforesaid Regulation. See *Maha Prasad* v. *Ramani Mohan Singh,* L R 41 I A 197.

*P C Appeal No. 136 of 1924. 21st July, 1925.

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Subsequently, the settlement operations of lands in the Sonthal Parganas (including those comprised in the mortgage) having been completed and duly notified in the *Calcutta Gazette* in accordance with S. 5 of the Sonthal Parganas Settlement (Amendment) Regulation, III of 1908, which replaced the aforesaid Regulation of 1872, the mortgagee's representatives instituted a fresh suit to enforce the mortgage in 1915 in the Court of the said Subordinate Judge, and claimed both a decree for sale and a personal decree. The mortgagors' representatives pleaded, *inter alia,* that the judgment of the Privy Council in the 1904 suit operated as *res judicata,* and barred a fresh action upon the same mortgage ; that compound interest was illegal and that all interest already paid in compliance with the deed should be refunded ; and that under the Mithila school of Hindu Law the joint family was not liable for a debt not contracted by a common ancestor of all its members, and that a member of such family was not liable for any debt contracted by the ancestor jointly with another person.

*Held,* (*i*) the Court of the Subordinate Judge, Bhagalpur, being in 1915 a Court having jurisdiction under S. 5 of the Regulation of 1908, which it was not at the time of the institution of the first suit in 1904; the judgment in the 1904 suit did not act as *res judicata* against the new suit ; but in so far as the relief by a personal decree was implicitly included in the general relief claimed in the first suit, the grant of such personal decree in the second suit was barred by reason of the Civil Procedure Code, S. 11 and Explanation IV thereto ; (*ii*) in exercising his jurisdiction, the Subordinate Judge was bound to conform strictly to the requirements of S. 6 of the Sonthal Parganas Settlement Regulation, III of 1872, as amended by Regulation V of 1893, and to disallow compound interest and all interest paid in excess of that specifically prescribed therein ; *Ramchandra Marwari* v. *Keshobati Kumari,* 1 C L J 182 approved ; and (*iii*) it is not inconsistent with the principles of the Mithila (which for the most part is identical with the Mitakshara) school of Hindu Law that a member or descendant of a joint family should be liable for a debt contracted by an ancestor alone apart from another member of the family. *Bhagput Pershad Singh* v. *Girja Koer,* I L R 15 C 717 referred to.

Two consolidated cross-appeals from a decree, dated 12th April, 1922, of the High Court (Dawson Miller, C. J. and Bucknill, J.) which varied a decree, dated 17th June, 1918, of the Subordinate Judge, Bhagalpur (H. N. Majumdar, Esq.).

The facts and arguments appear from the judgment of their Lordships.

*L. de Gruyther, K. C.* and *Dube* for appellants, Sourendra Mohan Sinha and others.

*Sir G. Lowndes, K. C.* and *E. B. Raikes* for respondents, Hari Prasad Sinha and others.

21st July, 1925. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—These are two consolidated appeals from a decree of the 12th April, 1922, of the High Court at Patna, which varied a decree of the 17th June, 1918, of the Subordinate Judge of Bhagalpur.

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The suit in which these consolidated appeals have arisen was instituted in the Court of the Subordinate Judge of Bhagalpur on the 5th February, 1915. The plaintiffs claimed Rs. 11,81,811 principal and interest alleged to be then due under a mortgage bond of the 21st December, 1896, for Rs. 3,50,000, of which Rs. 1,36,142 were advanced in cash, the balance being money alleged to be due under a previous bond of the 3rd October, 1883, and for moneys advanced at various times, and for interest at various rates. The bond in suit provided that the principal sum of Rs. 3,50,000 was to carry 7 1|2 per centum compound interest with yearly rests. The principal was repayable in the month of Phagon, 1310 Fasli, the last day of which month was the 14th March, A.D. 1903. The bond was executed by all the adult male members of the joint family, the members of which family lived in the Sonthal Parganas, and was also executed by them on behalf of all the minor members of the joint family as their guardians. It was intended that the bond should bind all the members of the joint family and the property mentioned in the bond. All the defendants, except as later in this paragraph is mentioned, are members of the joint family. The joint family is governed by the school of Hindu law of the Mithila. The grantee of the bond, who was the mortgagee, was Surja Narain Singh, Bahadur, of the District of Bhagalpur, by profession a pleader, who had occasionally acted for the joint family, and knew its financial position ; he died long before this suit was brought, and the plaintiffs are his representatives and are the persons in whom are vested his rights under the bond. The defendant, Dwarka Prasad Singh, was by birth a member of the joint family. Since the bond was made he was adopted into another family. The other defendants, who are not members of the joint family, claim through the joint family. The executants of the bond, in addition to granting the rights of a mortgagee to Surja Narain Singh, declared by the bond that they should jointly and severally pay the principal and interest, simple and compound, for which the bond was given.

A previous suit on the same mortgage bond of the 21st December, 1896, had been brought in the Court of the Subordinate Judge of Bhagalpur on the 20th June, 1904, by the then representatives in interest of Surja Narain Singh, the deceased mortgagee, against the then members of the joint family and others who claimed title through members of that family. That suit of 1904 came on appeal to His Majesty in Council

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and was dismissed by His Majesty in Council acting upon and adopting the advice tendered to His Majesty in a judgment of the Board which was delivered on the 19th May, 1914, by Lord Moulton. In considering the advice which it will be the duty of their Lordships to tender to His Majesty in these consolidated appeals, it will be necessary to refer at some length to the judgment of the Board of the 19th May, 1914. That judgment of the Board is reported in *Maha Prasad* v. *Ramani Mohan Singh* (1).

In each of the suits the main claim was for a decree which might be executed by a sale of the mortgaged property on default of payment by the mortgagors of the amount decreed to be due under the mortgage bond. In each of the suits there was a claim for such other relief as the plaintiffs might be entitled to, which would include a decree on the personal liability under the mortgage bond of the persons who might be the mortgagors. The property mortgaged was the joint property of the joint family, the greater part of which was situate within the Sonthal Parganas. That joint property extended from the Sonthal Parganas into the district of Bhagalpur, and the smaller part of the joint property thus happened to be situate within the local limits of the ordinary jurisdiction of the Subordinate Judge of Bhagalpur. The mortgage bond was executed in Bhagalpur and was registered in the Bhagalpur Registry.

The mortgage bond has been translated, and to that translation their Lordships will refer. By their bond the mortgagors declared that they would repay to the mortgagee the said sum of Rs. 3,50,000 in the month of Phagon, 1310 Fasli, and further declared that they should pay interest on the Rs. 3,50,000 at the rate of 7 1|2 per centum per annum on the 1st Phagon, 1304 Fasli, and thereafter every year on the 1st Phagon, and that if they should fail to pay such interest the interest should be treated as principal, and interest on interest should be charged at 7 1|2 per centum per annum and converted into principal after the 1st of Phagon, and the compound interest should be paid by them to the mortgagee, and that even after the expiry of the due date of payment (the 1st of Phagon, 1310 Fasli) they should pay such compound interest, and that "the rates and stipulations as regards interest should in no case be reduced and changed either before or after a decree is passed."

1. L R (1914) 41 I A 197 : 27 M L J 459 (P C).

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The mortgage bond also contained, amongst others, the following agreements by the mortgagors :—

"6. We do declare that we shall be jointly and severally bound to pay the principal, interest, compound interest as well as costs incurred in Court or privately, by the said Rai Bahadur, for realisation of the debt.

"7. For payment of the principal, interest, compound interest and costs referred to above, we the executants have mortgaged and hypothecated the properties mentioned in Sch. 2 of this deed to the said Rai Bahadur subject to the mortgage lien created under the bond, dated the 11th Assin, 1299 F. This is the first mortgage, and in support of continuation of the mortgage, the said bond has been left with the said Rai Bahadur and the amount due on the said bond has been included in this bond. Save and except the amount due under this bond there is nothing due by us to the said Rai Bahadur. If we do not pay the money due to the said Rai Bahadur as stipulated in this bond, he shall be at liberty to bring a suit and to realise his dues together with costs, if any, by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. We the executants shall not put forward any plea that the mortgaged properties should be sold first and after that the amount with cost be realised from our person and other properties. The said Rai Bahadur shall be at liberty to bring the mortgaged properties to sale first or last.

"8. If the interest be not paid as stipulated in this bond, the said Rai Bahadur shall be competent to bring a suit and to realise the interest and compound interest by sale of all or any of the mortgaged properties or any portion thereof of from our person or other properties. The mortgaged properties which will be sold for realisation of the interest will be sold free of encumbrances of the balance of the loan and future interest and the same will be considered to have been sold. If there be any surplus sale proceeds after satisfaction of the interest and compound interest for which a suit might have been brought, the same shall be taken by the said Rai Bahadur towards payment of his (principal) dues. We the executants or any other person shall have no right to the said surplus sale proceeds. By the stipulations contained in this paragraph the said Rai Bahadur shall not be bound to sue for interest and compound interest (alone) but shall be at liberty to sue for the interest and compound interest or to sue for the same along with his suit for the principal, when he will be entitled to do so."

Clause 16 of the bond is as follows :—

"16. This loan has been taken at Bhagalpur. The said Rai Bahadur shall be at liberty to bring suit in the Court of District Bhagalpur and to realise his entire dues or the interest by sale of the mortgaged properties. We the executants shall raise no objection as to the suit being tried in the Court of District Bhagalpur. If we do so the same shall not be entertainable. Some of the Mauzas, *i. e.*, the mortgaged properties No. 1, mentioned in Schedule No. 2, lie in the District of Bhagalpur, and some in the District of Sonthal Parganas."

The Sonthal Parganas were in 1872 and are still a backward district, and the Government of India considered that the inhabitants of the Sonthal Parganas and their properties in the Sonthal Parganas required some protection from the opera-

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tions of money-lenders beyond the protection which was afforded by the law generally then in force in India, and enacted The Sonthal Parganas Regulation No. III of 1872 (known as the Sonthal Parganas Settlement Regulation), which came into force on the 1st May, 1872, and so far as it was material was in force until Regulation No. V of 1893, and the Sonthal Parganas Settlement (Amendment) Regulation, 1908 (III of 1908) were, as later is mentioned, enacted.

Section 5 of Regulation No. III of 1872 was as follows :—

"5. Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the *Calcutta Gazette* to have been completed and concluded, no suit shall lie in any Court established under the said Act 6 of 1871 in regard to any land or any interest in or arising out of any land, or for the rent or profits of any land, or regarding any village-head-ship or other office connected with the land, except as hereinafter provided ; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under S. 2 of the said Act 37 of 1855, or by the Settlement-officers hereinafter mentioned according as the said Lieutenant-Governor shall from time to time direct."

Section 6 of Regulation III of 1872, as amended by Regulation V of 1893, was and is as follows :—

"All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules, relaiing to usury, namely :—

"(*a*) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than 2 per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed.

"(*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

"(1) *Explanation.*—The expression 'intermediate adjustment of account' in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal.

"(1) *Illustration.*—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100."

As has been mentioned, the previous suit on the mortgage in question which came before the Board in 1914 was instituted in the Court of the Subordinate Judge of Bhagalpur, on the 20th June, 1904, and he tried the suit and made his decree therein on the 12th February, 1906. No notification that

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the settlement mentioned in S. 5 of Regulation III of 1872 had been completed and concluded was ever made in the *Calcutta Gazette*. In the suit of 1904, the two material issues to be determined were : (*a*) whether the Bhagalpur Court had jurisdiction in the suit, and (*b*) whether the mortgagees were precluded by S. 6 of Bengal Regulation III of 1872, as amended in 1893, from recovering compound interest or interest exceeding in amount the principal advanced. The Subordinate Judge, by his judgment delivered on 12th February, 1906, found all the issues in favour of the mortgagees, and made a decree under S. 86 of the Transfer of Property Act, 1882 (Act IV of 1882), for payment and for sale in the event of non-payment. From that decree the mortgagors appealed to the High Court at Calcutta, but at the hearing of that appeal the arguments were confined to issue (*b*). That appeal was heard by Harrington and Mukerji, JJ., who dismissed the appeal, holding themselves bound by some unreported decision of their Court to the effect that the words in S. 6 of Regulation III of 1872—" The Court having jurisdiction in the Sonthal Parganas "—meant a Court situate in that district and constituted under the Regulation, and did not include a Court situated outside, but exercising jurisdiction to order the sale of mortgaged property situated within that district. From that decree of the High Court there was the appeal to His Majesty in Council, which was before the Board in 1914. It appears that there were also then two other appeals to His Majesty in Council, one of which was from a decree of the High Court which reversed a decree of the Subordinate Judge with regard to the amount of interest recoverable under the decree of the Subordinate Judge as drawn up. Such was the position of the suit when the appeal to His Majesty in Council came before the Board in 1914.

The appeal to His Majesty in Council was elaborately and exhaustively argued by the learned Counsel for the parties, and the carefully considered judgment of the Board was delivered by Lord Moulton. Much of that judgment related to the history of legislation, which had ceased to apply to the Sonthal Parganas, and to which their Lordships need not now refer. In referring to that judgment of the Board, their references are to those portions of the judgment which express the decision of the Board on questions of law which are material to the right understanding of the appeal which was before the Board. If it be the fact that some of that was *obiter*, as the

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High Court at Patna thought, it is not to be assumed that any of the conclusions expressed in the judgment were unsound.

In the judgment which was delivered by Lord Moulton, their Lordships then constituting the Board having mentioned that the jurisdiction of a Judge of the Courts established under the Bengal, United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871, extended to "suits of which the value exceeds Rs. 1,000, and which are not excluded from his cognizance by the Sonthal Parganas Settlement Regulation, or by any other law for the time being in force," said that :

"they were clearly of opinion that these words of exclusion refer to S. 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of settlement officers or officers appointed by the Lieutenant-Governor of Bengal under S. 2 of the Regulation of 1855. This exclusive jurisdiction is therefore maintained, and suits in regard to land which is not in districts that have been notified as being completely settled are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purposes of this Appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts."

Later in the judgment the Board said :—

"The information supplied to their Lordships by the parties as to the notifications appearing in the *Calcutta Gazette* show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed, at dates prior to the institution of the suit, other portions were not settled. It is clear, therefore, that the suit came within the provisions of S. 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of officers appointed by the Lieutenant-Governor of Bengal, or by settlement officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the *Calcutta Gazette* to have been completed and concluded. The Court of Bhagalpur had, therefore, no jurisdiction to entertain the suit, and this appeal should be allowed."

"Reliance was placed by counsel for the respondents on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. The Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of S. 5 of the Sonthal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of that jurisdiction."

The judgment of the Board also dealt with the question of the right of the mortgagees to claim compound interest. That question was also before the Board in one of the other

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appeals as to which the Board had to tender advice to His Majesty, and their Lordships held that

"Apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of S. 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and therefore to have refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan."

The plaintiffs in the suit of 1904 did not specifically ask the Subordinate Judge of Bhagalpur, or the High Court or the Board to grant them a decree for money in their general claim for further relief on the personal undertaking in the mortgage bond of the mortgagors to pay the debt and interest.

Their Lordships in considering the present consolidated appeals will, where necessary, follow and apply the judgment of the Board which was delivered by Lord Moulton in the previous suit, but the question as to the jurisdiction of the Court of the Subordinate Judge of Bhagalpur to entertain the present suit depends on circumstances which did not exist when the previous suit was instituted on the 20th June, 1904.

By Regulation III of 1908, Ss. 5 and 5-A were substituted for S. 5 of Regulation III of 1872. S. 5 which was substituted for S. 5 of the Regulation of 1872 is as follows :—

"5. (1) From the date on which, under S. 9, the Lieutenant-Governor declares, by a notification in the *Calcutta Gazette,* that a settlement shall be made of the whole or any part of the Sonthal Parganas, until the date on which such settlement is declared, by a like notification, to have been completed, no suit shall lie in any Civil Court, established under the Bengal, Agra and Assam Civil Courts Act, 1887, in regard to :—

(*a*) any land or any interest in, or arising out of, land, or

(*b*) the rents or profits of any land, or

(*c*) any village headship or other office connected with any land, in the area covered by such first-mentioned notification ; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it.

"(2) Between the dates referred to in sub-section (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under S. 2 of the Sonthal Parganas Act, 1855, or S. 10 of this Regulation, according as the Lieutenant-Governor may from time to time direct ; and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed, determine them."

S. 5-A does not bear on this question of jurisdiction, and need not be considered.

Their Lordships agree with the High Court that the effect of S. 5 of Regulation III of 1908, which replaced S. 5 of the Regulation of 1872, has been to exclude for the future

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after that substitution the jurisdiction of the Civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed. The mortgagors were the appellants in the appeal before the High Court, and the High Court found on the evidence that the appellants in the appeal before the High Court had failed to prove that at any time the mortgaged property was notified for settlement and not notified as settled and that the defence that the Subordinate Judge of Bhagalpur had no jurisdiction to entertain the present suit failed. In their Lordships' opinion it is not shown that on the facts before the High Court the High Court came to a wrong conclusion that the Subordinate Judge of Bhagalpur had jurisdiction to entertain this suit, which was instituted on the 5th February, 1915. But in entertaining this suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of S. 6 of the Regulation III of 1872, as amended in 1893.

As the mortgage was made in Bhagalpur and some part of the mortgage lands are within the local limits of the jurisdiction of the Court of the Subordinate Judge of Bhagalpur, and as the jurisdiction of the Court of the Subordinate Judge to entertain the suit on the mortgage was not on the facts of the case, which were accepted by the High Court as proved, not excluded by the substituted S. 5 of the Regulation of 1872, their Lordships, accepting the findings on that question of the High Court as correct, hold that the Subordinate Judge of Bhagalpur had jurisdiction to entertain the present suit, which was instituted on the 5th February, 1915. In entertaining the suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of S. 6 of Regulation III of 1872, as amended by Regulation V of 1893, and was bound in making a decree in favour of the mortgagees to comply with that section, which limited his powers. Issue 11, as amended by the Subordinate Judge, was "Are the plaintiffs (the mortgagees) entitled to (a decree for) compound interest or to one (a decree for interest) exceeding the principal (amount lent) ?" The Subordinate Judge in this suit made a decree for the plaintiffs which included interest, both simple and compound, and such interest exceeded the amount of the original debt or loan. His decree in favour of the plaintiffs was for Rs. 15,27,997-8-3 in respect of the mortgage debt and

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interest thereon, and for Rs. 44,164 as a personal decree in respect of the declaration in the mortgage bond that the mortgagees would personally pay the Rs. 3,50,000, which included Rs. 12,968-11-3, which he held was not secured on the mortgaged property. From that decree the mortgagees and other defendants affected by it appealed to the High Court, not only as to the interest which had been allowed, but also as to the personal decree.

The appeal was heard by Sir Dawson Miller, C. J., and Mr. Justice Bucknill. These learned Judges carefully considered the facts of the case and applied S. 6 of Regulation III of 1872 as amended in 1893. They disallowed all the compound interest on the actual debts, and thereby reduced the amount of Rs. 15,27,997 to Rs. 3,88,673, and similarly reduced the amount of the personal decree from Rs. 44,164 to Rs. 23,181. Assuming that S. 6 of Regulation III of 1872, as amended in 1893, applied, it is not disputed that those reductions were correctly arrived at by the High Court. In their Lordships' opinion S. 6 of Regulation III of 1872, as amended, applied.

It was also contended in the appeal to the High Court that some of the money claimed, Rs. 12,968-11-3, as a debt was not advanced for a necessity of the joint family and was not an antecedent debt for which the joint family property was liable under the mortgage bond. As to that Rs. 12,968-11-3 the High Court agreed with the Subordinate Judge that the mortgaged property was not liable in respect of it, and that it might be recovered under a personal decree, but the High Court, by disallowing compound interest on it, reduced the personal decree which had been made from Rs. 44,164 to Rs. 23,181.

The High Court allowed no interest on the principal loan, as the interest which had been paid or was included in the Rs. 3,50,000 amounted to more than the money lent or advanced, and made a decree for the plaintiffs for Rs. 3,90,157, and decreed that the mortgaged property or a sufficient part of it should be sold if that amount should not be paid on or before the 11th October, 1922, and if paid on or before the 11th October, 1922, the plaintiffs should deliver up to the defendants or to such persons as they should appoint all documents in their possession, or power, relating to the mortgaged properties, and should, if so required, re-transfer the same to the defendant free from the mortgage and from all encum-

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brances created by the plaintiffs or any person claiming under them. And further ordered and decreed that the plaintiffs should realise from the persons and properties of the defendants 1 to 5 the sum of Rs. 23,270 on their personal liability, and also ordered and decreed that the plaintiffs, respondents in the appeal to the High Court, should pay to the defendants the sum of Rs. 6,012 being the proportionate costs incurred by the defendants in the High Court.

From that decree of the High Court these consolidated appeals have been brought. The reasons alleged by the plaintiffs in their case are, so far as it is necessary to refer to them, that S. 6 of the Regulation III of 1872, as amended in 1893, does not apply; that the payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000, and that in any case the High Court should have allowed interest at Rs. 6 per cent. from the date of the institution of the suit. The reasons alleged by the defendants in their case are, so far as it is necessary to refer to them, that the claim for a personal decree is barred; that the mortgage bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity; and that under the Mithila School of Law the joint family could not be bound by any debt which was not originally contracted by a common ancestor of all its members, and that in such a family a descendant is not liable for any debt for which his ancestor was liable jointly with another person.

As to the contention on behalf of the plaintiffs that S. 6 of the Regulation III of 1872, as amended in 1893, does not apply and that payments already made in respect of interest ought not to have been deducted from the sum of Rs.3,50,000. Their Lordships hold that in entertaining this suit the Subordinate Judge of Bhagalpur was a Court "having jurisdiction in the Sonthal Parganas," and they agree with the Board in the 1904 suit that any Court would be bound to give full force and effect to the provisions of S. 6 of Regulation III of 1872, amended in 1893.

S. 6 of Regulation III of 1872 as amended by Regulation I of 1908 was very carefully considered in the High Court at Calcutta in *Ramchandra Marwari* v. *Rani Keshobati Kumari* (2) in which case Maclean, C. J. and Pargiter, J. held that S. 6, Regulation III of 1872, as amend-

2. (1905) 1 C L J 182.

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ed by Regulation V of 1908, does not authorise any Court to decree as interest a larger sum of money than would, together with prior payments if any, equal the original loan or debt. In that case Ghose J., differing, held that all that a Court has to see to when a suit is instituted, is that the interest claimed in the suit does not exceed the limit prescribed in the section.

As to the contention on behalf of the plaintiffs that the High Court should have allowed interest from the date of the institution of the suit. Under the circumstances of this case, as will presently appear, that contention must be limited to the sum of Rs. 3,88,673. That Rs. 3,88,673 was the total sum which the High Court rightly found to be allowable in respect of the principal loan. The question as to whether interest should be allowed from the institution of the suit was considered by the High Court. The Subordinate Judge who tried the suit by his decree of the 17th June, 1918, decreed interest from the institution of the suit only on the amount of the personal decree and ordered that an account should be taken of the mortgage debt due under the mortgage bond. The taking of such an account was necessary in order to complete the decree of the Trial Judge for execution. The account was taken by his successor in the office of Subordinate Judge of Bhagalpur who had not tried the suit, but in making the final order as to the account which he made on the 14th May, 1919, he did not confine himself to making an order for the amount which on taking the account he found to be due as the mortgage debt, which would complete the decree of 17th June, 1918, of the Trial Judge, but proceeded to award interest from the date of the suit on the amount of the mortgage debt. That as appears to their Lordships was not within the scope of his powers. He was not a Judge sitting in review or in appeal. He had to take the decree of the 17th June, 1918, as it had been drawn up. He had not power to alter it. His duty was to take the account which it directed to be taken. He had power, if necessary, to order who should be liable, and to what extent, for the costs of taking the account. The allowance of interest post the date of the institution of a suit is by S. 34 of the Code of Civil Procedure, 1908 (Act V of 1908), within the discretion of the Court, and as a rule the Board has not interfered with the exercise of a discretion vested in a High Court. That the High Court carefully considered whether interest should or should not be allowed by the High Court post the date of the institu-

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tion of this suit is apparent from the following passage in the judgment of the Chief Justice. He said :—

"It is not very clear why the learned Judge awarded interest only upon the amount of the personal decree and not on the amount of the mortgagee decree, but there is no cross-appeal on this question. I think there is much to be said for the argument that the Sonthal Parganas Regulation applies only to the interest to be decreed under the bond, and does not limit the powers of a Court under S. 34 of the Civil Procedure Code to award interest on the decretal amount until realization. But it has been held in this Court in *Rani Keshobati Kumari* v. *Kumar Satya Niranjan Chakravarty* (3) that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan, but only upon the amount of the principal debt itself, as to do so would contravene the provisions of the Regulation relating to compound interest. The principle underlying this decision applies equally where the amount decreed as interest already equals the sum advanced. Although I have some doubt as to the propriety of the decision mentioned, I am not prepared to differ from the conclusion there arrived at, and I think we should follow that decision."

Their Lordships have not before them a report of the decision of the Patna High Court to which the Chief Justice referred. But it is not necessary or advisable to consider whether the discretion of the High Court on that question of post institution of the suit interest was wisely exercised or not in respect of the amount decreed on the principal sum secured by the mortgage bond.

As to the contention on behalf of the defendants that the claim for a personal decree is barred it is necessary to consider whether the plaintiffs could have made a claim for a personal decree in the suit of 1904. Each of the suits was brought on the same mortgage bond. In the suit of 1904, as in this suit, a decree for sale of the mortgaged property was the principal relief claimed. In the suit of 1904 a decree under S. 90 of the Transfer of Property Act, 1882 (Art. IV of 1882), was also claimed as a relief, and "such other reliefs as may under the circumstances of the case be deemed proper may be granted," the last mentioned claim is generally known as claim for general relief. In the present suit the fifth claim for relief is "That such other relief or reliefs as may under the circumstances of the case be deemed proper may be granted to the plaintiffs." It was under the fifth claim for relief that the personal decree was granted by the Subordinate Judge. Although in the suit of 1904 the Subordinate Judge had no power to make a decree for sale of the mortgaged property, he could have made, and the High Court in Appeal could have made, a personal decree, and the Board could have advised

3. C W N Suppt 1918 Patna 305.

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His Majesty that the plaintiffs were entitled to a personal decree, the plaintiffs omitted to make any specific claim for a personal decree.

The contention that the claim for a personal relief is barred arises under S. 11 of the Code of Civil Procedure, 1908 (Act V of 1908), by which it is enacted that :—

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

. . . . . .

"*Explanation IV.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. In their Lordships' opinion the right to the personal decree in this suit was barred by S. 11 of Act V of 1908, and this suit must be dismissed so far as any claim for a personal decree is concerned.

As to the contention on behalf of the defendants that the bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity, the Board may observe that in an appeal from the decree of a High Court in a suit which involved, as this did, as will presently appear from a passage which their Lordships will quote from Mr. Justice Bucknill's judgment, a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before their Lordships the findings of fact by the High Court upon which it based its decree must draw the attention of their Lordships to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. This has not been done by either side in this case, owing most probably to the fact that it was not possible to do it. Neither side has drawn their Lordships' attention to any material evidence from which the High Court drew a conclusion of fact which their Lordships would not have drawn.

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These consolidated appeals are appeals from a decree of the High Court which examined laboriously the many advances for the aggregate of which that Court made its decree. These advances were made over a series of years beginning in 1883, and extending down to 1896, and were made to one or other of the principal adult members of the joint family, and it has not been suggested that any one of those advances was made for immoral purposes, or were secret advances and made without the knowledge of the other members of the family, who were adults at the time. The members of the family were not sufficiently provident always to live within their means, and debts were incurred which it was necessary in the interests of the joint family should be discharged. Their Lordships may quote a paragraph from the judgment of Mr. Justice Bucknill in this suit which illustrates the difficulty of the enquiry as to the loans which are included in the aggregate sum. Mr. Justice Bucknill said :—

"(4) A question as to the non-existence of legal necessity or family benefit for a large portion of the loan in question. This contention involved before the Subordinate Judge a very careful consideration of the elements of which the loan was in fact composed ; and it has also been the subject of laborious enquiry and research before this Court. In cases such as these, where, in order to find the actual origin of portions, very often small and very often numerous, of what is a large aggregate sum of money one has to try to trace it back for a great many years, it is frequently almost impossible to deal with each individual item in any very satisfactory manner, and, indeed, it is probably doubtful if it is right or necessary so to do. The Subordinate Judge took the broad view that, in the main, old loans contracted for the purpose of paying off earlier debts of a composite character should be regarded as carrying their own burden of proof that they fell, roughly speaking, within the confines of what may properly be regarded as legal necessity or family benefit."

From an examination of such of the evidence as has been brought to their Lordships' attention their Lordships accept the conclusion of the High Court that these advances were for the necessary purposes of the joint family.

As to the remaining contention on behalf of the defendants based on what is said to be the law of the Mithila School that no member of a Hindu joint family subject to the law of the Mithila School is bound to pay the debt of an ancestor which was contracted jointly by the ancestor with another member of the joint family. That proposition thus broadly stated is a wide one, and would apply in the case of a son or a grandson of the ancestor who was under a pious duty to pay the debt of his father or his grandfather whether he was or was not in possession of assets which had come down to him from his

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father or his grandfather. That is a startling proposition. The Law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara. Assuming that it was a debt which, if contracted by the father or grandfather alone, it was the pious duty of the son or of the grandson to pay, it is difficult to understand on what principle of the law of the Mithila school it was not a debt which it was the pious duty of the son or grandson to pay if it were contracted jointly with another who was a member of the joint family.

Assuming that the Chief Justice was correct in stating in his judgment that *Vivada Chintamani* is an authority which is binding upon those who are governed by the Mithila school of Hindu law, the passages which have been cited as from it to their Lordships as appearing in the Tagore Translation at pages 34 and 35 seem to relate only to debts contracted by the ancestor with a stranger. From the judgment of the Chief Justice it appears, as was the fact, that the debt which was challenged in his Court on the authority of the *Vivada Chintamani* was a debt which was charged by the bond on the joint property of the family by each of the heads of the then four branches of the joint family, and all the other defendants, who were members of the joint family, were their sons or grandsons, and he observed that there was under circumstances no reason why the charges should not be held as binding upon the property in suit. With that observation of the Chief Justice, which, in their opinion, was consistent not only with commonsense, but with the law which the High Court in the appeal was administering in the suit, their Lordships agree. The Chief Justice referred *Bhagput Pershad Singh* v. *Girja Koer* (4) which may have come from the Mithila country.

Their Lordships will therefore humbly advise His Majesty —(1) that the appeal of the plaintiffs ought to be dismissed and the appeal of the defendants allowed in part and the decree of the High Court of Judicature at Patna dated the 12th April, 1922, set aside so far as it was a personal decree against the defendants and in other respects except as to costs affirmed ; (2) that the decree of the Court of the Subordinate Judge at Bhagalpur, dated the 17th June, 1918, for the sale of the mortgaged property and for costs ought to stand except that so far as it was a personal decree against the defendants it should be set aside ; (3) that neither side ought to be allow-

4. (1888) I L R 15 C 717 (P C).

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ed any costs of the appeals in the said High Court and that any costs paid under the decree of that Court ought to be returned ; (4) that the time within which the defendants ought to pay into Court the sum of Rs. 3,88,673 in respect of the mortgage debt and interest ought to be extended until the expiry of eight months from the date of the receipt by the High Court of His Majesty's Order in Council herein ; and (5) that there ought to be paid by the plaintiffs to the defendants their costs of these appeals.

Solicitors for Sourendra Mohan Sinha and others : *Barrow, Rogers* and *Nevill.*

Solicitors for Hari Prasad Sinha and others : *Watkins* and *Hunter.*

A. de M.

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## PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT :—LORD SUMNER, LORD BLANESBURGH, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

Kuar Mata Prasad and another ... *Appellants**

*v.*

Kuar Nageshar Sahai and others ... *Respondents.*

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*Oudh Estates Act (I of 1869), Ss. 8 and 13—Oudh Estates Amendment Act (III of 1910), Ss. 6 and 21—Talukdari property—Talukdar's will containing bequest to younger son not registered—Younger son in possession of devised property—Suit against his widow for possession—Widow's compromise of suit—Elder son's will authorising his widow to adopt a son—Suit by reversioner to set aside will and recover possession of estate—Judgment declaring will genuine—Subsequent suit by another reversioner to set aside will and recover possession*—Res judicata—*Civil Procedure Code,* 1908, *S.* 11, *Expl.* 6—"*Persons litigating in respect of a right claimed in common for themselves and others interested in such right.*"

A talukdar of Oudh (who died in 1873), and whose name was included in Lists II and V under S. 8 of the Oudh Estates Act (I of 1869) by his will made in 1869, (which, however, was not registered as prescribed by S. 13 of that Act) devised one property *X,* to his eldest son *A,* and another property *Y,* to his younger son *B.* The sons were then placed, and thenceforth remained, in possession of the respective properties until their death within a few months of each other in 1887, whereupon *A's* son and heir C, succeeded to the property *X,* and *B's* widow *D* took possession of the property *Y.*

In 1897 *C* brought a suit against *B's* widow, *D,* for recovery of possession of *Y,* alleging that it devolved to him because (1) being subject to the said Act I of 1869, the devise thereof to *B* by will, which was not registered, was

*P C Appeal No. 27 of 1924. 30th July, 1925.

void ; and (2) by the Mitakshara Law the family at his uncle *B's* death having been joint and undivided. The first ground of claim was rejected by the Court, but before the second ground could be tried, a settlement was effected between the parties, and later duly embodied in a decree of Court in December, 1899, the document of compromise, *inter alia,* reciting an admission by *D* "that the properties in dispute are Talukdari properties, and succession to them will be governed by Act I of 1869, and *C* is entitled to hold the same as lawful heir of *B.*""

On *C's* death in 1905, his widow, *E,* propounded a will dated 23rd October, 1904, authorising her to adopt a son ; but in 1906, *F,* a presumptive reversioner, brought a suit against her for a declaration that the will was a forgery, and that he was entitled to *C's* estate, *i. e.,* property *X,* by reversionary right. This suit was ultimately in December, 1913, dismissed by the Privy Council, who pronounced the will genuine. The widow *E* then in 1914 adopted *G* as the son to *C* in pursuance of the will.

In 1918, *H,* another reversioner, instituted a suit against *G* and *C's* nephews, beneficiaries under the last mentioned will, for possession of both the *X* and *Y* properties on the grounds of (1) his being "the eldest member of the senior branch of the original Talukdar's family," and the properties being subject to Act I of 1869 or Act III of 1910 ; (2) even if property *Y* be deemed not subject to these Acts, an old custom in the family whereby the eldest member of the senior branch is entitled to the estate. He claimed also a declaration that the will of *C,* dated 23rd October, was false, and the adoption of *G* by *E* was void, and further contended that the compromise by *B's* widow *D* in 1899 was invalid as she had no right to make any admission that the property was subject to Act I of 1869, when in reality it was not. The defendants in the suit (respondents) denied the plaintiff's title to the property, and the existence of the alleged custom, and pleaded that the judgment of December, 1913, constituted *res judicata* and barred the present suit, and that the will of 1869 not having been registered, the property *Y* was not subject to Act I of 1869 nor Act III of 1910.

*Held,* (1) as the judgment in a suit brought by a presumptive reversioner against a Hindu widow or her assignees binds all the reversioners as a body, and the Civil Procedure Code, 1908, S. 11, Explanation 6, forbids fresh litigation on the same cause of action, the judgment of December, 1913, was, so far as regards property *X, res judicata,* on the validity of *C's* will. *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty,* 9 Suth W R 505; *Venkatanarayana Pillai* v. *Subbammal,* L R 42 I A 125 ; *Janaki* v. *Narayanaswami,* L R 43 I A 207; and *Kesho Prasad Singh* v. *Sheo Pargash Ojha,* L R 51 I A 381 referred to. (2) As regards property *Y,* the bequest by will to the younger son having once failed through the will not being registered in accordance with S. 13 of Act I of 1869, it could not be validated anew by the Oudh Estates Amendment Act (III of 1910), S. 6, this Act being by S. 21 thereof declared to be not retrospective. Accordingly, upon failure of the bequest, the property *Y* passed out of the operation of the Oudh Estates Act (I of 1869), and became subject to the ordinary Hindu Law of succession. (3) The compromise effected by *B's* widow, *D,* in 1899, while part of the suit against her was *sub judice,* having been made to avoid a long litigation, and the creation of a burden on the family property, was prudent and reasonable, and gave effect to the rule of

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Hindu Law relative to the devolution of the property upon the death of the widow to the nearest agnate. Her admission, therefore, in the document of compromise, that the property was subject to Act I of 1869 nowise affected the rights accruing to the parties under the law governing succession. · *Ramsumran Prasad* v. *Shyam Kumari*, L R 49 I A 342.

Two consolidated appeals against two decrees of the Court of the Judicial Commissioner of Oudh (Daniels and Lyle, JJ.) dated 2nd March, 1922, which varied a decree of the Subordinate Judge of Lucknow (S. Asghar Hassan, Esq.), dated the 31st January, 1920.

The material facts and arguments appear from the judgment of their Lordships.

*A. M. Dunne, K. C.*, and *W. Wallach* for appellants.

*L. de Gruyther, K. C.* and *J. M. Parekh* for respondents.

30th July, 1925. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI :—This litigation relates to two properties named respectively Baragaon and Wali, one situated in the district of Hardoi and the other in Kheri, in the province of Oudh. Both belonged to one Raja Fateh Chand who died in 1873. After the annexation of Oudh they were re-granted to Fateh Chand and his name was included with regard to the Hardoi property under List II and in respect of the Kheri property under List V, prepared under Act I of 1869 (the Oudh Estates Act). To these Lists reference will be made more particularly later on in this judgment.

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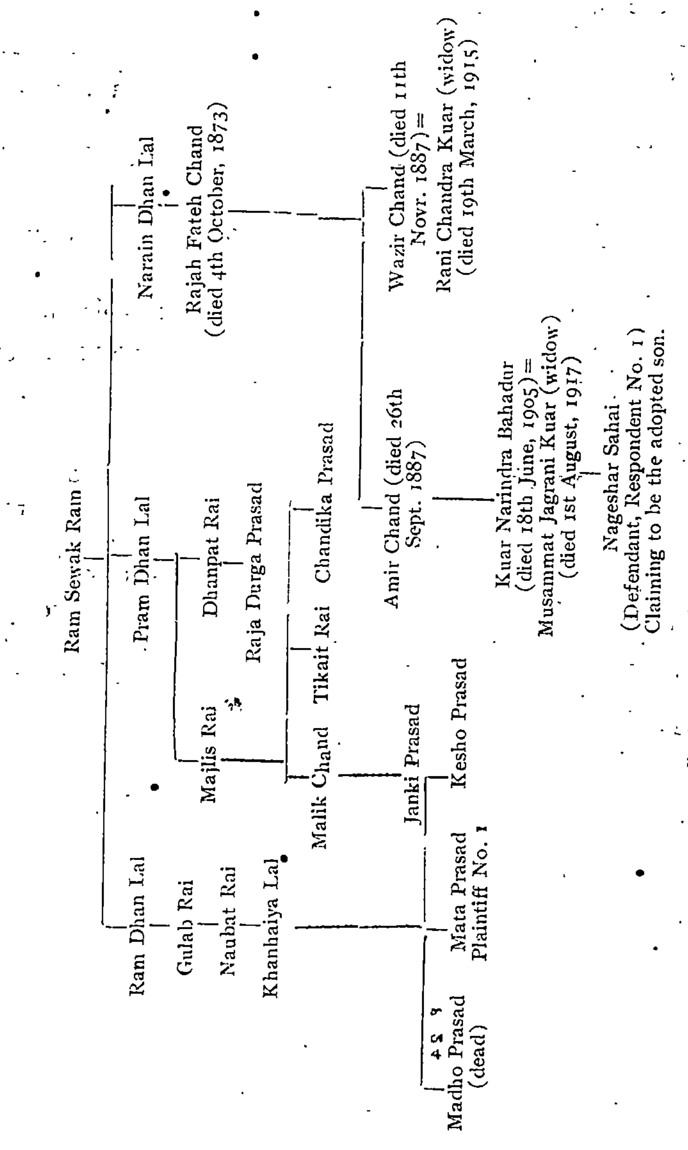
The following genealogical table will explain the position of the parties in this case :—




Mata Prasad, the plaintiff No. 1, claims possession of the properties in question on various grounds, which will be set out later. The second plaintiff is the assignee of Mata Prasad of a share in the two estates. In this judgment wherever the plaintiff is mentioned it refers to Mata Prasad.

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Act I of 1869 came into force in January of that year; and in March following Raja Fateh Chand purported to make a will, under which he devised the Kheri property, in other words the Wali estate, to his eldest son, Amir Chand; and the Hardoi property, the Baragaon estate, to the younger son, Wazir Chand. So far as appears on the record, Amir Chand and Wazir Chand appear to have been placed in possession of the two estates respectively. Raja Fateh Chand died, as already stated, in 1873; but the will he had made in 1869 was never registered under the provisions of S. 13 of the Act, which requires a will in favour of a younger son of the Talukdar whose name does not appear in the third or fifth of the lists mentioned in S. 8 to be registered within a certain specified time. This section will be referred to later. Consequently, it is not disputed, that the bequest to Wazir Chand, the younger son, was invalid and inoperative. He, however, remained in possession of the Hardoi estate (Baragaon) until his death on the 11th November, 1887.

Amir Chand, the eldest son of Fateh Chand, had died two months earlier, *viz.*, on the 26th September, 1887; as the will in his case did not require registration the devise in his favour was valid in law and operative.

Wazir Chand left him surviving a widow named Chandra Kuar who appears, on his death, to have taken possession of the Hardoi property. Chandra Kuar died on the 19th of March, 1915.

On the death of Amir Chand, as already stated, his son and heir, named Narindra Bahadur, succeeded to the Kheri estate. In 1897 he brought a suit against the widow of Wazir Chand for a declaration of his own title as regards the Hardoi estate and for possession of the property. To the particulars of his claim their Lordships will refer more fully later on. It is sufficient at this stage to say that he based his title to the Baragaon estate on the allegation that it was subject to the provisions of Act I of 1869 and that he was entitled to it in preference to Chandra Kuar, Wazir Chand's widow. In the alternative, he alleged that, even if the estate was not governed by the provisions of the Act and was subject to the Hindu law, pure and simple, the property devolved on him on the death of Wazir Chand, his uncle, as they were joint and undivided at Wazir's death. The Subordinate Judge in that case held that the property was subject to the provisions of Act I of 1869 and that the plaintiff, Narindra Bahadur, was

entitled to it in preference to Chandra Kuar. He accordingly decreed the plaintiff's claim. On appeal to the Judicial Commissioner's Court it was held the property in dispute was not subject to Act I of 1869. The decree of the Subordinate Judge was accordingly reversed and the case was remanded for the purpose of deciding whether the claim of Narindra Bahadur was well founded on the alternative ground, namely, that under the law of the Mitakshara, to which the parties were subject, he was entitled to the property.

Before the trial on the remand the parties compromised the dispute and a decree was made on the 20th December, 1899, in accordance with the settlement at which they had arrived. Reference will be made later to the terms of the settlement, as one of the questions raised in the present litigation relates to the power of Chandra Kuar to enter into that compromise.

Narindra Bahadur died on the 18th June, 1905, leaving him surviving his widow, Jagrani Kuar. Shortly after his death Jagrani Kuar propounded a will alleged by her to have been executed by Narindra Bahadur on the 23rd October 1904, giving her power to adopt a son to him.

On the 30th April, 1906, one Raja Durga Prasad, claiming to be a reversioner of Narindra Bahadur, brought a suit against Jagrani Kuar in the Court of the Subordinate Judge of Kheri for a declaration that the will propounded by her as the will of Narindra Bahadur was a forgery and that he was entitled to the estate by virtue of his reversionary right. Durga Prasad's suit had a chequered career. His claim was dismissed by the Subordinate Judge on the ground that the will was genuine and had been duly executed by Narindra Bahadur. The decree of the Subordinate Judge was reversed on appeal by the Judicial Commissioners, who held, chiefly as it appears, on suspicion, that the will was not genuine. They accordingly decreed the claim of Raja Durga Prasad.

Jagrani Kuar appealed to His Majesty in Council from the decree of the Judicial Commissioners, and on the 3rd December, 1913, it was held by their Lordships on a careful examination of the evidence relating to the execution of the will that it was fully established to be the act of Narindra Bahadur. The decree of the Appellate Court was accordingly set aside and that of the Subordinate Judge dismissing the suit of Durga Prasad was restored.

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Narindra Bahadur's will having been thus finally declared to be valid, Jagrani Kuar, in conformity with the power entrusted to her by her deceased husband, adopted on the 22nd May, 1914, the defendant Nageshar Sahai as the son of Narindra Bahadur.

On the 20th of April, 1918, the present suit was instituted by Mata Prasad and his assignee, plaintiff No. 2, in the Court of the Subordinate Judge of Hardoi for the possession of the two estates lying, respectively, in the Hardoi and Kheri Districts, with a declaration regarding Mata Prasad's title.

It is desirable to notice briefly the allegations on which the claim is founded and on which the long and ingenious arguments in the course of the trial mainly rest.

In paragraph 12 of the plaint it is stated that the Baragaon and Wali (Sarawa) Estates "are subject to Act I of 1869," and that the plaintiff, Mata Prasad, as the oldest member of the senior branch, is entitled to them with their appurtenances. In paragraph 13 he claims alternatively that even if Baragaon "be not deemed" subject to the Act, he is entitled to the same by virtue of the custom.

The reason of this alternative claim will be clear as the judgment proceeds.

He asked, accordingly, for a declaration that the adoption of Nageshar Sahai was invalid and that the will under which Jagrani Kuar purported to make the adoption was false.

The first defendant, Nageshar Sahai, is, as already stated, the alleged adopted son of Narindra Bahadur. The other two defendants are the sons of Narindra's sister, who acquired title to certain portions of the estate under his will. Both sets of defendants dispute the title of the plaintiff, Mata Prasad. Nageshar Sahai further contends that the plaintiff's claim is barred by the rule of *res judicata* arising out of the decision in Raja Durga Prasad's case, and consequently in respect of Baragaon, the Hardoi estate, it is not maintainable. With regard to the assertion that the Baragaon estate is subject to Act I of 1869, the defendants further contend that the will of Fateh Chand, executed in March, 1869, under which the testator had purported to devise the Hardoi estate to Wazir Chand was never registered and consequently it had gone out of the operation of Act I of 1869 and succession, so far as that property was concerned, was governed by the general provisions of the Hindu Law. They also denied the

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existence of any custom such as the plaintiff alleged in paragraphs 12 and 13 of his plaint.

In answer to the defendants' allegation that the will of Fateh Chand was not operative, as it was never registered, the plaintiff averred that if the will of 1869 was invalid there was a prior will made in 1860, the terms of which were formulated or embodied in the village administration papers, called wajib-ul-arz ; and he claimed that effect should be given to that will.

He further urged that even if the estate went out of the operation of Act I of 1869 in consequence of the non-registration of the will it was brought back under the Act on the passing of the amending Act III of 1910. The arguments in support of this contention have occupied a great deal of the time of the Courts in India and of this Board.

Their Lordships, however, propose to confine their attention to the principal contentions advanced before the Board.

The Subordinate Judge of Lucknow, before whom the case came on for trial, raised a large number of issues which he has discussed at considerable length in his judgment. In dealing with the plea of *res judicata* based on the decision in Durga Prasad's suit he adopted what appears to their Lordships an unprecedented and irregular course ; he refused in fact to be bound by the decisions of the Judicial Committee. To show the mistake into which he has fallen their Lordships consider it desirable to refer to two passages in his judgment :

" Granting on the basis of these authorities that the widow represents the entire estate which consists of herself and the reversioners, I am unable to see how it follows that one reversioner in a suit against the widow represents the entire body of the reversioners. The commonly accepted position of the reversioners is that one does not claim through the other. Obviously, therefore, the judgment in a suit between one reversioner and any other person, widow or some other person, does not stand as a bar to the trial of the same question as between another reversioner and the same person on the other side in another suit. I do not see how this principle is changed in this particular case before me.

The basis of this general principle is that the title of one reversioner is quite separate from and independent of the title of any other reversioner. It is all the more so in the present case as the first plaintiff's title has originated in a special legislation of the Act III of 1910 of the United Provinces Council, the Act amending Act I of 1869. He was not one of the reversioners at any rate immediate reversioners of the property at the time the suit was brought by Durga Prasad. He had no title as a reversioner. His title arose on the passing of the Act in the year 1910. It passes my comprehension how a person can be said to be debarred from setting up a title in a suit, when that title had no existence at the time at which any other litigation took place concerning the

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property to which the title relates. To my mind the present suit could hardly be said to be barred even if the present plaintiff No. 1 had himself been the plaintiff in place of Durga Prasad. The requirements of 'litigating under the same title,' would be wanting for constituting the bar of *res judicata.*"

The reference at the end of the passage quoted to Act III of 1910 appears futile, for the cause of action and the charge respecting the genuineness of Narindra Bahadur's will are the same as in the previous case.

On this reasoning he refused to be bound by the decision of the Board in *Venkatanarayana Pillai* v. *Subbammal* (1).

Regarding the genuineness of Narindra Bahadur's will, the authenticity of which was declared by the Judicial Committee in 1913, the Subordinate Judge expressed himself as follows :—

"I have never entertained any doubt on the question and I have no hesitation in holding upon this issue that the trial of the genuineness of the will of Narindra Bahadur is not barred by the judgment in the case between Durga Prasad and Jagrani."

And again :—

"The conclusion at which the learned Subordinate Judge and their Lordships of the Privy Council arrived on the evidence in that case is not warranted by the evidence in this case, which besides exposing the position of Khuda Bakhsh and Ganga Prasad, is confined to the actual execution of the will and falls far short of the evidence produced in that case of the intention."

He held accordingly that the plaintiff's claim was not affected by the bar of *res judicata,* either as to the representative character of Durga Prasad's suit, or by the Board's decision on the issue of fact relating to the genuineness of the will of Narindra Bahadur, and that he had established his title to the Kheri estate.

He held, however, that, as the will of Fateh Chand was inoperative as regards the Hardoi estate, not having been registered under the provisions of S. 13 of Act I of 1869, and S. 13 (*a*) of Act III of 1910 was not retrospective, the estate was not brought back under the Act of 1869, as the plaintiff contended. He held, therefore, that Mata Prasad failed to establish any title to the same. He accordingly decreed the plaintiff's claim in respect of the Kheri estate and dismissed his suit with regard to the Hardoi property.

Both parties appealed to the Court of the Judicial Commissioner of Oudh. The learned Judges of the Appellate Court were of opinion, as their Lordships think rightly, that the plaintiff's claim was in fact *res judicata,* and therefore liable

1. L R (1915) 42 I A 125 : 28 M L J 535 (P. C).

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to be dismissed in respect of the Kheri property. They further held, in agreement with the Subordinate Judge, that the Hardoi estate was never under Act I of 1869 and was not brought back under the Act by anything contained in the later Act. They accordingly dismissed the whole suit.

From this decree the plaintiffs have appealed to His Majesty in Council. On the arguments before the Board, the first question for determination centres on defendants' plea of *res judicata,* in other words, whether the proceedings in the suit of Raja Durga Prasad form a bar to the present action by Mata Prasad.

It has been contended before their Lordships, as it was before the Subordinate Judge who accepted and gave effect to the argument that the reversioners have each an independent cause of action, and as none of the reversioners derive title from the others, the result of a suit against the widow and her assignees brought by a reversioner, presumptive or otherwise, does not bind the others, nor can the suit be considered as brought in a representative capacity. The same argument, though clothed in other words, was presented to their Lordships in the case of *Venkatanarayana Pillai (since deceased)* v. *Subbammal and another* (1) where the governing principle applicable to a suit brought by a reversioner in the lifetime of the widow to get rid of a common apprehended danger to the interests of the general body of reversioners, was set out at length. In re-affirming the rule enunciated in that case their Lordships desire to observe that so long ago as 1868 Sir Barnes Peacock, then Chief Justice of Bengal, indicated in the Full Bench case of *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (2) the position of the presumptive reversioner seeking to get rid of any act of the widow during her lifetime which jeopardised the common interests of the reversioners. Act VIII of 1859, which was then in force governing procedure, contained no such provision as was embodied in Expl. 5 to S. 13, Act X of 1877, and afterwards reproduced in Expl. 6, S. 11 of Act XIV of 1882 and Act V of 1908. The words, "cause of action," therefore, needed judicial interpretation. Sir Barnes Peacock's *dicta* deserve attention. The main question in the case referred to was whether adverse possession as against the widow barred the rights of reversioners. The language of the Chief Justice in dealing with the point is important. He says first: "but

1. L R (1915) 42 I A 125 : 28 M L J 535 (P C).
2. (1868) 9 Suth. W R 505, 509 (F B).

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reversionary heirs presumptive have a right, although they may never succeed to the estate, to prevent the widow from committing waste."

He then goes on thus :—

"It is said that the reversionary heirs could not sue during the lifetime of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred. When, therefore, we construe the words 'cause of action' in the Statute of Limitation, we must consider them as referring, not to a new cause of action accruing to the reversionary heirs personally and individually, but to the cause of action which accrued to the heir or representative, for the time being, of the deceased."

The principle enunciated in *Venkatanarayana Pillai* v. *Subbammal* (1), which was followed in *Janaki Ammal* v. *Narayanaswami Aiyar* (3), is logically sound and "salutary," to use Lord Blanesburgh's expression in the judgment in *Kesho Prasad Singh* v. *Sheo Pargash Ojha and another* (4).

Reversioners possess individually what has been called a *spes successionis,* the bare possibility of succeeding to the estate of the last owner in case the widow dies leaving any one of them surviving entitled to take immediate possession after her, unless, of course, the husband has left the power to her to adopt a son. But the *spes* is common to them all ; so is the danger by the widow's act against the interests of the reversioners. The right to sue to set aside that common danger is given for obvious reasons of policy and convenience to the person, who, if the widow died at the moment, would take the estate. But the result, favourable or otherwise, affects the reversioners as a body.

As pointed out in the case of *Venkatanarayana Pillai* v. *Subbammal* (1), Expl. 6 to S. 11 of the Civil Procedure Code covers exactly cases of the kind under consideration and bars a fresh litigation on the same cause of action.

The learned Judges of the Judicial Commissioner's Court, in their very able judgment, have set out, in clear terms, the considerations on which the principle is founded.

It has been contended on behalf of the plaintiff that the suit by Durga Prasad was incompetent inasmuch as he was not at the time the presumptive reversioner to Narindra Baha-

1. L R (1915) 42 I A 125 : 28 M L J 535 (P C).
3. L R (1916) 43 I A 207 : 31 M L J 225 (P C).
4. L R (1924) 51 I A 381 : 47 M L J 824 (P C).

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dur. This contention could only have been advanced on a misconception of the facts. Jagrani Kuar, the defendant in that suit, appears to have taken the same objection that Durga Prasad had no right to maintain the action. The Subordinate Judge in the suit of Durga Prasad states first the ground of the claim in these terms : "The plaintiff (Durga Prasad) is one of the reversioners to Narindra Bahadur and Wazir Chand and as such his interest to the said property will suffer if the will is allowed to stand, and so he has instituted the present suit, seeking (among others) the following declaratory relief, *viz.,* that the will propounded is a forged document." The learned Judge then proceeds to deal with the objection, *viz.,* Durga Prasad's incompetency. Reference to the pedigree would show that the persons standing nearest in degree to Narindra Bahadur were at the time Chandika Prasad and Durga Prasad. The learned Subordinate Judge therefore says in his judgment : "The sale deed by Chandika Prasad in favour of the plaintiff (Durga Prasad) is evidence sufficient to show that he is unable to sue for want of funds, and so the plaintiff is entitled to sue."

That finding was never, so far as their Lordships can see, impugned in the Judicial Commissioner's Court or before this Board.

Mata Prasad, the plaintiff in the present suit, is a remote sapinda of Narindra Bahadur. He was in existence at the time when Raja Durga Prasad brought his action. He was aware, as his brother Kesho Prasad swears, of the institution of the suit. There is nothing to show that the litigation between Raja Durga Prasad and Jagrani Kuar was collusive or vitiated by fraud or laches on the part of Durga Prasad in conducting the suit or in asserting his reversionary right. Nothing of the kind is proved or even alleged.

The Subordinate Judge dismissed Durga Prasad's "claim for a declaration of the forgery of the will." But he declared it to be invalid and inoperative in respect of certain bequests in favour of the defendants other than Jagrani Kuar. On appeal to the Judicial Commissioner's Court, the decree of the Subordinate Judge affirming the due execution of the will by Narindra Bahadur was reversed, but it was restored by this Board on the 3rd December, 1913, which found the will to have been duly executed by the defendant's husband with the power of adoption.

On a review of all the facts, their Lordships are of opinion, in concurrence with the learned Judges of the Appel-

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late Court, that the suit by Durga Prasad against Jagrani Kuar for a declaration that the will of Narindra Bahadur was false and fabricated, was brought by him in his capacity of the presumptive reversioner, and as such the decision in that suit binds the plaintiff, Mata Prasad. His claim as regards the Kheri estate is clearly barred.

Assuming that the claim as to the Baragaon estate in the Hardoi District is not so barred, the question of the plaintiff's title to this property has to be considered from a different point. He contends, in the first place, that, even if the will of 1869 was invalid for want of proper registration, he could fall back upon the will of 1860, to which reference is made in the document of 1869. Beyond this there is absolutely no evidence of the fact that Fateh Chand had made any bequest to Wazir Chand in 1860. Reference has been made to a number of documents called wajib-ul-arz, but they are not statements by Fateh Chand himself. They contain statements by some of his agents, all of whom speak of the mode of descent customary in the family. The Hardoi estate granted to Fateh Chand was placed in List II. This list includes the Talukdars, whose estates, according to the custom of the family, on or before the 13th February, 1856, ordinarily devolved upon *a single heir*. The purport of the statements contained in the wajib-ul-arz simply referred to the fact that the particular estate which was held by Wazir Chand was descendible to a single heir and nothing more. Whether it was descendible to a single heir or not, the bequest, being invalid owing to want of registration, left the property open and out of Act I of 1869. It was conceded in the Appellate Court that unless the plaintiff could show that the property came back under Act I of 1869, by virtue of the provisions of Act III of 1910, the plaintiff had no right to the property. Section 13 of Act I of 1869 is in these terms :—

"No taluqdar or grantee and no heir or legatee of a taluqdar or grantee shall have power to give or bequeath his estate or any portion thereof or any interest therein to any person not being either (1) a person who under the provisions of this Act or under the ordinary Law to which persons of the donor or testator's tribe and religion are subject would have succeeded to such estate or to a portion thereof or to an interest therein, if such taluqdar or grantee, heir, or legatee had died intestate, or (2) a younger son of the taluqdar or grantee, heir, or legatee, in case the name of such taluqdar or grantee appears in the third or the fifth of the lists mentioned in S. 8 except by an instrument of gift or a will executed and attested not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift,

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or will, as the case may be, and registered within one month from the date of its execution."

The amendment which was made by Act III of 1910, called the Oudh Estates Amendment Act of 1910, S. 6, runs thus :—

"6. After S. 13 of the said Act, the following section shall be inserted, namely :—

13-A. No taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, and no transferee referred to in S. 14, and no heir or legatee of such transferee, shall have power to bequeath his estate, or any portion thereof or any interest therein (1) (*a*) to a person who would have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect, (*b*) to his daughter, (*c*) to a son of his daughter, or (*d*) to a younger son, except by a will duly executed and attested; (2) to a person who might, in the absence of other heirs, have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect, except by a will duly executed and attested not less than three months before the death of the testator and presenteed for registration within one month from the date of its execution and registered ; (3) to any person other than a person mentioned in cls. (1) and (2), except by a will duly executed and attested not less than three months before the death of the testator and registered according to the law for the time being in force relating to the registration of assurances, but presented for such registration within one month from the date of its execution."

As the learned Judges of the Judicial Commissioner's Court point out, that section is not retrospective and does not validate a bequest which had already failed. It would be anomalous, to say the least, to suppose that the legislature intended by Act III of 1910 to revive rights that had disappeared in consequence of the failure of the bequest in 1869 when other rights had been created in the meantime.

Section 21 of Act III of 1910 shows clearly that nothing in that Act has the effect which is contended for by the plaintiff. Section 21 says :—

"Unless there s something repugnant in the saving clause, subject or context (*a*) S. 2, sub-section (1) of this Act, with the exception of (*i*) cl. (*b*) of the definition of the word 'estate'; (ii) the words 'or a mother' in the definition of the word 'heir'; and (*b*) Ss. 3, 4, 7 and 8 of this Act, shall operate retrospectively ; but nothing contained in the said sections shall affect suits pending at the commencement of this Act, or shall be deemed to vest in or confer upon any person any right or title to any estate, or any portion thereof, or any interest therein, which is, at the commencement of this Act, vested in any other person who would have been entitled to retain the same if this Act had not been passed; and the right or title of such other person shall not be affected by anything contained in the said sections."

In their Lordships' opinion the contention that on the passing of Act III of 1910 the Baragaon estate became once

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more subject to Act I of 1869 has no substance. With the failure of the bequest the property passed out of the Act and became subject to the Hindu Law.

But it is urged that the compromise between Narindra Bahadur and Chandra Kuar was invalid, inasmuch as the widow had no right to make an assertion that the estate was subject to Act I of 1869 when it was not so. The compromise between Narindra Bahadur and Chandra Kuar bears date the 25th November, 1899. Para. 1 recites :—

"That Chandra Kuar admits that the properties in dispute are Taluqdari properties, and succession to them will be governed by Act 1 of 1869 and Kuar Narindra Bahadur is entitled to hold the same as lawful heir of Raja Wazir Chand."

By para. 2 Kuar Narindra Bahadur agreed *inter alia* to Rani Chandra Kunwar remaining in possession of the properties in question.

By para. 3 he further agreed that he shall not by any deed or will alienate the said immoveable property or his rights in it as long as the said Rani Sahiba remains alive, but if he does so that alienation shall be null and void.

It is contended that Chandra Kuar had no right to enter into the compromise. Their Lordships are of opinion that the learned Judges of the Appellate Court in India are right in regarding it as a family settlement which was "prudent and reasonable" under the circumstances, to use the language of Lord Phillimore in the case of *Ramsumran Prasad* v. *Shyam Kumari* (5).

Narindra Bahadur's suit had been decided in his favour by the Subordinate Judge. On the appeal the Judicial Commissioners had reversed his judgment and remanded the case for the consideration of the second part of the claim. The matter was still open to another appeal. Under those circumstances, in order to avoid a long litigation and the creation of further burden on the family property, Chandra Kuar entered into a compromise acknowledging Narindra Bahadur's right to the inheritance after her death, he on his side binding himself not to alienate the property during her lifetime. As stated already, the settlement arrived at between the parties appears to their Lordships to have been both prudent and reasonable in the circumstances of the case, and the plaintiff has no right to question it now.

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5. L R (1922) 49 I A 342.

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Narindra Bahadur was, in their Lordships' opinion, the nearest agnate of Wazir Chand, and if the property was subject to the provisions of the Hindu Law, as their Lordships find, whether he was joint or separate from Wazir Chand, he was entitled to the property on the death of his widow. The compromise, in fact, gave effect to this rule of the Hindu Law. The acknowledgment of the widow that the property was subject to Act I of 1869 would not affect the rights of the parties on the basis of the law governing the succession.

The adoption of Nageshwar by Jagrani Kuar, although it took place in 1914, takes effect from the death of the father, to whom he is adopted, and therefore there was no intervening time during which it could be said that the property was not held by any one. It may be noted here that both the Courts in India have negatived the plaintiff's allegation of the allegation contained in paras. 12 and 13 of his plaint.

In view of the peculiar course adopted by the Subordinate Judge in dealing with this case, and in order to prevent other Courts in India from falling into the same error, their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of "judicial dignity" or otherwise, to question its decision on any particular issue of fact. Any application for review of judgment on grounds permissible by law only lies to the Judicial Committee.

With these remarks their Lordships desire to express their entire concurrence with the judgment of the Judicial Commissioner's Court. They will accordingly humbly advise His Majesty that the plaintiffs' appeal should be dismissed with costs.

Solicitor for appellants (plaintiffs) : *Solicitor, India Office.*

Solicitors for first respondent (defendant) : *T. L. Wilson and Co.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Palaniappa Chettiar ... *Appellant** (*2nd Legal representative of the plaintiff*)

*v.*

B. Raja Rajeswara Sethupathi *alias* Muthuramalinga Sethupathi Avl., Rajah of Ramnad and others ... *Respondents* (*Defendants* 1 *to* 3 *and L. R. of* 1*st plaintiff and* 3*rd plaintiff*).

Palaniappa Chettiar *v.* Raja Rajeswara Sethupathi Avl.

*Malicious prosecution—Suit for damages for—Death of plaintiff pending—Right of his executor or legal representative to continue suit—Claim for general and special damages being out of pocket expenses caused by wrong of defendant—Effect.*

In a suit for damages for malicious prosecution, the plaintiff claimed a sum of money by way of general damages, and he also claimed special damage under two heads. The first was vakil's fees and the second was travelling and other incidental expenses for securing the attendance of witnesses for the purpose of defending the prosecution which was launched against him. Pending the suit, the plaintiff died, and the question arose whether his executor or legal representative could continue it.

*Held,* affirming the Court below, that he could not.

The thing can be put in two ways: (1) on a narrower, and (2) on a broader ground. The narrower ground is that the plaintiff's cause of action throughout is the tortious act of which he was the victim, and not the fact that he incurred out-of-pocket expenses, *e. g.,* for getting himself cured by a doctor in case of personal injuries or getting himself defended by a barrister or a vakil. That goes to swell the bill against the defendant but it is not a cause of action. The plaintiff will recover his out-of-pocket expenses caused by the wrong of the defendant as part of the damages for his general cause of action, *i. e.,* malicious prosecution. While to the executor or legal representative, however, the expenditure would be the sole cause of action, because to that alone would he be entitled to a judgment. The causes of action for the deceased man himself and that, if any, of his executors, are so different that it would be impossible to permit his legal representative to carry on a suit instituted by the deceased.

The broader ground is that the said expenses are not losses to the estate of the deceased within the meaning of the Act. The real cause of action is the malicious prosecution, and the out-of-pocket expenses must be treated as a mere incident of that cause of action and not as giving rise to a separate head of liability enuring after death to the legal representative.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 20 of 1923.

*V. Rajagopala Aiyar* for appellant.

*C. V. Anantakrishna Aiyar* and *S. Sundararaja Aiyangar* for respondents.

*Appeal No. 131 of 1924. 28th August, 1925.

Palaniappa Chettia. v. Raja Rajeswara Sethupathi Avl.

Coutts Trotter, C. J.

The judgment of the Court was delivered by

*The Chief Justice* :—This is a point of some little interest. A man called Subramanya Chetti started a suit for damages for malicious prosecution and in his plaint he claimed a sum of money by way of general damages and he aslo claimed special damage under two heads. The first was vakil's fees and the second was travelling and other incidental expenses for securing the attendance of witnesses for the purpose of defending the prosecution which was launched against him. We will take it that that prosecution failed, and, had this unfortunate man lived, he would have got substantial damages against the defendant which would have included the special damage alleged to have been incurred by him. As a matter of fact he died while the suit was pending and when the suit actually came on for trial before the learned Subordinate Judge it was proposed to continue the action with his executor or legal representative substituted as the plaintiff. The learned Judge held that that could not be done and we agree with him.

The thing can be put in two ways: (1) on a narrower and (2) on a broader ground. The narrower ground is this: that his cause of action throughout is the tortious act of which he was the victim, and not the fact that he incurred out-of-pocket expenses, *e. g.*, for getting himself cured by a doctor in case of personal injuries or getting himself defended by a barrister or a vakil in case of malicious prosecution. That goes to swell the bill against the defendant but it is not a cause of action. The cause of action is that which was done to him by running him over or by prosecuting him maliciously as the case may be. When we come to the case of an executor or legal representative his cause of action on behalf of the estate is quite different. He can only sue for a tangible, measurable, pecuniary loss caused to the estate by reason of the tortious act so that it would follow on the narrower ground that although both the plaintiff if living and his legal representative after his death had a cause of action for the recovery of these out-of-pocket expenses caused by the wrong of the defendant nevertheless they would recover them in different rights and for different reasons. The living plaintiff will recover them as part of the damages for his general cause of action, *i. e.*, malicious prosecution; while to the executor or administrator the expenditure would be the sole cause of action be-

Palaniappa Chettiar v. Raja Rajeswara Sethupathi Avl.

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cause to that alone would he be entitled to a judgment. It may be put as it was put in the English case of *Pulling* v. *Great Eastern Railway Co.* (1), on the broader ground that these expenses are not losses to the estate of the deceased within the meaning of the Act of Parliament (the wording of which is practically identical with that of the Indian Statute) because they are so submerged and overtopped by the real cause of action which was the tortious injury (here malicious prosecution) that they must be treated as a mere incident of that cause of action and not as giving rise to a separate head of liability enuring after death to the legal representative. On that view the legal representative could not start an independent action for the expenses of the malicious prosecution as in the present case. We respectfully agree, but in any event we think that the learned Judge was quite correct in holding in accordance with the authorities in Calcutta and Madras that the cause of action of the deceased man himself and that, if any, of his executors are so different that it would be impossible to permit his legal representatives to carry on a suit instituted by him to recover damages. That being so, there is no cause of action and this appeal will be dismissed. One set of costs to be divided.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Akella Kesavaramayya and others... *Appellants** (*Plaintiffs*)

*v.*

Visamsetti Venkataratnam and others ... *Respondents* (*L. Rs. of 4th and 5th respondents, Defendants 5 to 14 and L. Rs. of the deceased 8th and 9th defendants*).

Kesavaramayya v. Venkataratnam.

*Limitation Act, S. 19—School Committee—Loan to—Resolution of the Committee authorising two of the members to execute a promissory note—Note found invalid—If can be relied on as acknowledgment of liability.*

A person advanced certain sums of money to a School Committee for the upkeep of the school and for certain buildings connected with it. The Committee by a resolution authorised two of its members to execute a promissory note to the creditor, and in pursuance thereof a promissory note was executed

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* S. A. No. 1356 of 1919. 1st September, 1925.

1. (1882) 9 Q B D 110.

Kesavaramayya v. Venkataratnam.

mentioning the proceedings of the Committee and reciting the fact that it was executed on behalf of the Committee. The promissory note was found to be invalid as it was made payable to bearer. *Held,* it could still be relied upon as an acknowledgment of liability within the meaning of S. 19, Limitation Act.

It is not necessary that in the promissory note itself the fact that it is an acknowledgment should be recited; the execution of the note itself is in acknowledgment of the liability. *Natarajulu Naicker* v. *Subramanian Chettiar,* (1922) I L R 45 Mad. 778 : 43 M L J 695, *Nachimuthu Chetty* v. *Andiappa Pillai,* (1917) 6 L W 630 followed.

Second Appeal against the decree of the District Court of Kistna at Masulipatam in A. S. No. 122 of 1918 preferred against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 83 of 1916.

*A. Krishnaswami Aiyar* for appellants.

*S. Varadachariar, K. Krishnamachariar* and *K. Venkataswami Naidu* for respondents.

The Court delivered the following

JUDGMENT :—The only question in this second appeal is whether the suit is barred by limitation. The plaintiffs are the sons of Venkayya Garu and sue the defendants who are the members of the Committee called Sri Kannika Parameswari Visamsetti Venkataratnam Hindu High School Committee for a certain sum alleged to be due to the plaintiffs. The Subordinate Judge gave a decree in favour of the plaintiffs. On appeal the District Judge at Masulipatam dismissed the suit on the ground that it was barred by limitation.

The defendants who are the members of the Sri Kannika Parameswari Visamsetti Venkataratnam Hindu High School Committee took over the management of the Hindu High School at Bezwada with all its assets and liabilities from another committee called Sri Kannika Parameswari Hindu High School Committee in November, 1915. Both the committees were registered under the Registration of Societies Act, 1860. Venkayya advanced considerable sums of money for the upkeep of the school and for certain buildings connected with the school and the committee of the school authorised two of its members to execute a promissory note in his favour for the amount due. Ex. E was executed on 18th November, 1913. The suit was filed on 14th November, 1916. The promissory note was found to be invalid as it was made payable to bearer. The plaintiffs rely upon S. 19 of the Limitation Act and wish to treat Ex. E as an acknowledgment in writing and signed by the agent of the debtors duly authorised in their behalf. The contention of Mr. Varadachariar for the res-

Kesava-ramayya v. Venkata-ratnam.

pondents is that the executants of Ex. E were not authorised to make an acknowledgment and therefore it cannot be treated as an acknowledgment under S. 19 of the Limitation Act. Ex. D-3 which is dated 17th November, 1917, he contends, is not an acknowledgment for it only authorises two members of the committee to execute a promissory note. D-3 is the resolution of the committee authorising the President and the Secretary and a member of the committee (Gopala Rao) to execute a promissory note for the sum of Rs. 3,500 to Venkayya Pantulu. D-3 is not an acknowledgment of liability. In pursuance of the authority Ex. E was executed on 18th November, 1913. Ex. E therefore is an acknowledgment of liability of the committee to the extent of Rs. 3,500 to Venkayya. It is not necessary that in the promissory note itself the fact that it is an acknowledgment should be recited; the execution of the note itself is in acknowledgment of the liability. When a person borrows a certain sum of money and executes a promissory note he executes it for the consideration received by him and when it is executed in respect of a consideration already passed it is an acknowledgment of the liability to pay the amount mentioned in the note. It was held in *Nachimuthu Chetty* v. *Andiappa Pillai* (1) that though a promissory note cannot be enforced as offending against S. 26 of the Paper Currency Act it can nevertheless be used as evidence of an acknowledgment of liability. This case was followed in *Natarajulu Naicker* v. *Subramanian Chettiar* (2). Ex. E mentions the proceedings of the committee and recites the fact that it is executed on behalf of the committee. Ex. E therefore is an acknowledgment of liability within the meaning of S. 19 of the Limitation Act and the suit filed within three years of it is not barred by limitation.

The appeal is allowed and the Lower Court will try the other issues in the case. The appellants will be entitled to the costs of this Second Appeal.

T. S. V. *Appeal allowed and case remanded.*

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1. (1917) 6 L W 630. 2. (1922) I L R 45 Mad. 778 : 43 M L J 695.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Bulkee Bee and others ... *Appellants** (*Counter-petitioners 3 to 7*).

*v.*

Kaka Hajee Muhammad Ummar Sahib and others ... *Respondents* (*Petitioners and 1st counter-petitioner*).

Bulkee Bee *v.* Kaka Hajee Muhammad Ummar Sahib.

*Civil Procedure Code, O. 34, Rr. 4 to 6—Personal liability of mortgagor—When arises—Proceeds of the sale insufficient—Decree under R. 6 necessary—Preliminary decree not executable.*

Under the present Code of Civil Procedure, in the case of mortgage decrees it is only if the proceeds of the sale of the mortgaged property are not sufficient to cover the decree amount that a personal decree for the balance can be passed under O. 34, R. 6. It is the decree that is passed under R. 6 that is executable against the mortgagors personally and in the absence of such a decree the mortgagee is not entitled to proceed against the property of the mortgagors other than those covered by the mortgage. The preliminary decree under O. 34, R. 4 is not itself capable of execution and cannot therefore give a personal remedy against the mortgagors.

Appeal against the order of the District Court of North Arcot at Vellore, dated the 20th December, 1923, in E. P. No. 27 of 1922 in O. S. No. 40 of 1912 on the file of the Court of the Subordinate Judge of Vellore.

*A. Viswanatha Aiyar* for appellants.

*K. S. Krishnaswami Aiyangar* for respondents.

The judgment of the Court was delivered by

Devadoss, J.

DEVADOSS, J. :—Respondents 1 and 2 herein are the transferee decree-holders of the mortgage decree in O. S. No. 40 of 1912 passed on the 5th March, 1914. The mortgaged properties were sold but the sale proceeds were not sufficient to cover the decree amount. They applied to the Lower Court for execution against the property of the mortgagors not covered by the mortgage. The mortgagors objected to the execution on the ground that there was no personal decree against them and that the application was barred by limitation. The learned District Judge overruled the objection and allowed execution to proceed against the property of the judgment-debtors not covered by the mortgage. The judgment-debtors have preferred this appeal.

It is contended by Mr. Viswanatha Aiyar for the appellants that no decree was passed under O. 34, R. 6, and therefore there is no personal decree against the mortgagors and

* A. A. O. No. 255 of 1924. 23rd September, 1925

Bulkee Bee *v.* Kaka Hajee Muhammad Ummar Sahib.

Devadoss, J.

the order of the District Judge is wrong. The decree passed on 5th March, 1914, was only a preliminary decree and the final decree was passed on the 27th August, 1914. In the final decree no provision was made for proceeding against the properties other than those covered by the mortgage ; and no personal decree was passed against the mortgagors under R. 6. The question is whether the decree as it is can be executed against the properties of the judgment-debtors other than those covered by the mortgage.

Under the present Code of Civil Procedure, in the case of a mortgage, preliminary decree is passed under R. 4 of O. 34. If the mortgagor-defendant does not pay into Court the amount mentioned in the preliminary decree within the time fixed in the decree, a final decree for sale has to be passed under R. 5, and if the proceeds of the sale of the mortgaged property are not sufficient to cover the decree amount, a personal decree for the balance has to be passed under R. 6. It is the decree that is passed under R. 6 that is executable against the mortgagors personally. In the absence of a decree under R. 6 the mortgagee is not entitled to proceed against the property of the mortgagors other than those covered by the mortgage.

It is contended by Mr. K. S. Krishnaswami Aiyangar that inasmuch as the final decree does not contain a provision for personal remedy against the mortgagors the direction in the preliminary decree for payment of the amount should be taken to give a personal remedy and that decree could be executed against them. The contention that a preliminary decree is capable of execution is on the face of it untenable. *Ram Brichh Rai* v. *Deoo Tewari* (1) is relied on. In that case the Court passed a simple money decree for a portion of the claim which was not borrowed for legal necessity and a mortgage decree for the rest. The decree in that case gave two different reliefs to the decree-holders, one against the property and the other a simple money decree. The simple money decree was not a portion of the mortgage decree, nor was it in consequence of the sale proceeds of the mortgaged property not being sufficient to cover the amount of the decree. That case, therefore, has no application to the present case. *Cheruvalath Kumbanari Vala Kathala Erechain* v. *Theyyatath Karan* (2), *Periyasami Kone* v. *Muthia Chetty* (3) and *Rajah*

1. (1921) I L R 44 A 166. 2. (1914) M W N 497.
3. (1913) I L R 38 Mad. 677.

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Devadoss, J

of *Kalahasti* v. *Varadachariar* (4) do not help the respondents. In all these cases the decrees were passed under the old Code of Civil Procedure. Under that Code it was usual to pass one decree directing the sale of the mortgaged property and to provide that if the sale proceeds of the mortgaged property were not sufficient to cover the decree amount, the other properties of the mortgagors should be proceeded against. Under the present Code no such decree could be passed. The case of *Shiba Durga* v. *Gopi* (5) relied on by the respondents is against their contention. The learned Judges observe at page 577 :

"It may be more correct to say that it is the final decree which makes the preliminary decree operative and effectual and renders it enforceable in execution. In that view it is the final decree which is executed...... .. It is idle to say that the personal remedy which the decree-holder is seeking to enforce is to be found in the preliminary decree. The personal decree was not available till after the mortgaged properties had been sold under the decree absolute."

It has been decided by the Privy Council in *Ashfaq Husain* v. *Gauri Sahai* (6) that a preliminary decree is not capable of execution and that it is only a decree absolute under R. 5 of O. 34 that can be executed. This decision was followed by Miller and Sadasiva Aiyar, JJ. in C. M. S. A. No. 86 of 1910 and by Benson and Sundara Aiyar, JJ. in C. M. A. No. 269 of 1911.

Till the mortgaged properties are sold it is not possible to say whether the sale proceeds would be sufficient to pay off the decree amount. It is only when the sale proceeds are not sufficient to cover the whole of the decree amount that the personal liability to pay the balance arises, granting that the document sued on provides for personal remedy against the mortgagor and a preliminary decree cannot therefore give a personal remedy against the mortgagor.

In C. M. P. No. 111 of 1920 respondents 1 and 2 applied to the District Court of North Arcot for a personal decree under R. 6 of O. 34. Mr. Hughes, who was then the District Judge, dismissed the petition on the ground that there was already a personal decree. This order was not appealed against and is binding on the parties. Respondents 1 and 2 hereto cannot now ask for passing a final decree under R. 6 inasmuch as such relief was denied to them by the order in C. M. P. No. 111 of 1920.

4. (1911) 21 M L J 1036. 5. (1915) 23 C L J 573.
6. (1911) I L R 33 A 264 : 21 M L J 1140 (P C).

Bulkee Bee *v.* Kaka Hajee Muhammad Ummar Sahib.

Devadoss, J.

In the view we have taken it is unnecessary to consider whether the application of respondents 1 and 2 is barred by limitation.

In the result the appeal is allowed and the order of the District Judge is set aside with costs throughout.

T. S. V. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE MADHAVAN NAIR.

Ramaswami Goundan ... *Appellant** (*1st defendant*)

*v.*

Alagia Singaperumal Kadavul and another ... *Respondents* (*Plaintiff and 2nd defendant*).

Ramaswami Goundan *v.* Singaperumal Kadavul.

*Civil Procedure Code, S. 92—Trust—Property of—Alienation improper of, by founder's widow and heir—Suit by presumptive reversioner to recover property alienated—Maintainability—Founder appointing himself manager during his lifetime and his heirs after his death—Proper course for reversioner in such a case—Time if can be allowed to plaintiff to obtain permission and to proceed under S. 92.*

The founder of a trust for a temple appointed himself as manager during his lifetime and his heirs after his death. His widow, the 2nd defendant, was his nearest heir, and she alienated the trust property to the 1st defendant. The plaintiff, claiming to be a male reversioner to the estate of the founder, sued to recover the property alienated from the 1st defendant.

*Held,* that the plaintiff was not entitled to maintain the suit.

The proper course is for the plaintiff together with one or more interested persons after obtaining the required sanction under S. 92 of Civil Procedure Code to sue for 2nd defendant's removal from the trusteeship, and for appointment of himself or some other fit person to be trustee in her place. In such a suit the validity of the alienation could be decided. The person who becomes trustee or a receiver appointed in the suit may then sue on behalf of the idol for the recovery of the property improperly diverted from trust purposes.

*Held further,* that time could not be allowed to the plaintiff to apply and get permission to proceed either under O. 1, R. 8 or under S. 92, Civil Procedure Code, as to allow plaintiff to do so would alter the nature of the suit.

Appeal against the order of remand of the Court of the Additional Subordinate Judge of Coimbatore in A. S. No. 3 of 1924, dated the 30th June, 1924 (A. S. No. 214 of 1923 of the District Court of Coimbatore) in O. S. No. 619 of 1922, District Munsif's Court, Udumalpet.

*T. M. Krishnaswami Aiyar* and *T. G. Ramaswami Aiyar* for appellant.

*S. Srinivasa Aiyar* and *V. Subramania Aiyar* for respondent.

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*A. A. O. No. 330 of 1924. 7th September, 1925.

Ramaswami Goundan v. Singaperumal Kadavul.

The Court delivered the following

JUDGMENT :—This suit was brought by a male reversioner to the estate of the founder of a trust for the temple of Alagia Singaperumal Kadavul to recover property alienated in favour of 1st defendant by the act of the founder's wife, who is 2nd defendant. The District Munsif held that the plaintiff was not entitled to maintain the suit and dismissed it. The Additional Subordinate Judge was of a contrary opinion and ordered the suit to go on.

He relied on two cases, *Cunniah Chetty* v. *T. Ramanujachari* (1) and *Srinivasacharlu* v. *Subuddhi* (2). Both of these decisions were given in suits instituted when the Civil Procedure Code of 1882 was in force. When the amended Act of 1908 came into force it contained a new provision in cl. 2 of S. 92 barring suits in respect of charitable and religious trusts without first obtaining the permission of the Advocate-General.

We have been referred, in the course of the arguments, to two other cases, *Subramania Aiyar* v. *Nagarathna Naicker* (3) and *Rangaswami Naidu* v. *Krishnaswami Aiyar* (4). These were cases in which a number of persons had a common interest in a temple or charitable institution and a representative suit was allowed by the Court to be brought on behalf of all under S. 30 of the Code of 1882 (now O. 1, R. 8). When a village temple is owned in common by all the villagers of a certain village, this is the proper form of suing. In the present case the founder of the trust appointed himself as manager during his lifetime and his heirs after his death. His widow, who is 2nd defendant, is his nearest heir, and, as she alienated the trust property, she cannot be transposed as plaintiff. The reversioner cannot claim at present to be trustee. The proper course is for the plaintiff together with one or more interested persons after obtaining the required sanction under S. 92 to sue for 2nd defendant's removal from the trusteeship, and for appointment of himself or some other fit person to be trustee in her place. In such a suit the validity of the alienation could be decided.

The person who becomes Trustee or a Receiver appointed in the suit may then sue on behalf of the idol for the recovery

1. (1913) 24 M L J 48.
2. (1888) 23 M L J 348.
3. (1909) 20 M L J 151.
4. (1922) 44 M L J 116.

Ramaswami Goundan v. Singaperumal Kadavul.

of the property improperly diverted from trust purposes. It is suggested that we might allow some time for the plaintiff to apply and get permission to proceed either under O. 1, R. 8 or under S. 92, Civil Procedure Code, but we think that this cannot be done as it would alter the nature of the suit. The appeal is accordingly allowed with costs to be paid by 1st respondent in this Court and the Lower Appellate Court, and the decree of the District Munsif dismissing the suit with costs is restored. Second respondent to bear her own costs.

A. S. V. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Kandasami Chetty ... *Petitioner* (Counter-petitioner).*

Kandasami Chetty, *In re.*

*Criminal Procedure Code, S. 488—"Means"—Meaning—Wife—Husband's failure to support his—Maintenance order—Propriety of—Husband only 19 years old and unemployed—Effect—Order under S. 488—Persons aggrieved by—Remedy of, in Civil Court—Order unsatisfactory—Interference in revision.*

The expression "means" in S. 488, Criminal Procedure Code, does not signify only visible means such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife.

Persons aggrieved by an order under S. 488 must take their case to the Civil Courts. The section provides a speedy remedy and safeguards a deserted wife or child from starvation; but when other issues are raised they should be settled in the Civil Courts.

Though the order under S. 488 sought to be revised was considered to be not satisfactory, it was not interfered with in revision because petitioner had his remedy in the Civil Court.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Pollachi Division, dated 28th April, 1925.

*S. T. Srinivasagopalachari* for petitioner.

The Court made the following

ORDER :—Petitioner seeks to revise the order of the Sub-divisional Magistrate, Pollachi, under S. 488 of the Code of Criminal Procedure, by which he is directed to pay Rupees Ten (Rs. 10) per mensem as maintenance to his first wife. The order contains no clear issues or findings and the Magistrate

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*Cr R C No. 431 of 1925 (Cr R P No. 357 of 1925). 22nd July, 1925.

Kandasami Chetty, *In re.*

should understand that vituperation adds nothing to the force of a judicial pronouncement.

Apparently upon the evidence of counter-petitioner and her three witnesses the Magistrate finds that she was driven out of her home, not allowed to come back, and refused maintenance. He rejects the defence evidence to the contrary because he thinks the plea of enmity " rather mamool, " meaning presumably that it is a false plea often advanced. He finds that though slightly lame the counter-petitioner is able to work and accordingly he orders him to provide for his wife at the rate of Rupees Ten (Rs. 10) per mensem, not an extravagant rate for people in decent circumstances. He also hopes that the family will assist the husband to find the money.

Of course, maintenance can only be levied from the husband, and in expressing this hope the Magistrate passes no order against the husband's family. The point most strenuously pressed by petitioner is that since the husband is only 19 years old and unemployed, he has no means to support his wife. I do not take " means " in S. 488 of the Code of Criminal Procedure to signify only visible means such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife. I therefore find no absolute ground for interference ; but I agree with the petitioner that this order is not altogether satisfactory. It should have been more clearly set forth whether the wife has merely left the house upon the arrival of the second wife or has been actually driven out. If petitioner's remedy were concluded, there might be reason for re-opening the matter. But it is obvious from the statute itself that persons aggrieved by these magisterial orders are expected to take their case to the Civil Courts. Section 488 of the Code of Criminal Procedure provides a speedy remedy and safeguards a deserted wife or child from starvation ; but when other issues are raised they should be settled in the Civil Courts, and nothing is to be gained by protracted litigation in the Criminal Courts. Doubtless it is with that intention that no appeal has been allowed from orders under S. 488.

Therefore I decline to interfere and admission is refused.

A. S. V. *Petition dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Karnam Venkatasubba Rao ... *Appellant** (*Plaintiff*)

*v.*

Adinarayana Rao and others ... *Respondents* (*Defendants* 2, 3, 4, 5 *to* 10, 12, 14, 16, 17 *and* 19 *to* 40).

Venkatasubba Rao *v.* Adinarayana Rao.

*Service inam—Enfranchisement in name of Hindu widow—Estate taken by her—Inam register referring to her and her relations—Effect.*

The question was whether the property shown in an inam title-deed was the absolute property of a Hindu widow or whether she only enjoyed a Hindu widow's estate in that property. The title-deed stated that the inam was confirmed to the widow in freehold ; in other words, that the inam would be her own absolute property. The inam register referred to six persons, the first of whom was the widow and the others were her relations.

*Held,* that the property shown in the title-deed was the absolute property of the widow and that she had not merely a Hindu widow's estate therein.

There is no presumption either that the property dealt with was as a matter of fact the property of the joint Hindu family or that when Government makes a grant to persons comprising a widow and her relations, it must always be taken to imply that a widow's estate is intended.

Second Appeal against the decree of the District Court of Anantapur in A. S. No. 97 of 1921 preferred against the decree of the Court of the District Munsif of Anantapur in O. S. No. 20 of 1920 (O. S. No. 170 of 1919 of the District Munsif's Court of Penukonda).

*B. Somayya* for appellant.

*V. S. Narasimhachar* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal from the decree of the District Judge of Anantapur in A. S. No. 97 of 1921 on appeal from that of the District Munsif of Anantapur in O. S. No. 20 of 1920. The plaintiff sued for a declaration that he and defendants 1, 2 and 3 are the nearest reversioners to inherit the property of the late Ramappa and to recover possession of a quarter of the immoveable property described in the schedule attached to the plaint. Both the Lower Courts dismissed his suit.

The first point for consideration is that taken by the learned Judge in his fourth paragraph whether the property shown in the title-deed—Ex. G-1—is the absolute property of Savitri-

*S. A. No. 1496 of 1922. 29th July, 1925.

Venkatasubba Rao v. Adinarayana Rao.

amma or whether she only enjoyed a Hindu widow's estate in that property. The title deed—Ex. G-1—is perfectly clear : "The inam is now confirmed to you in freehold ; in other words, the inam will be your own absolute property." 'You' and 'your' referring to the six persons in the register, Ex. D-2, and the first of these six persons is Savitriamma. It can only be held that 'absolute property' in this document means with reference to Savitriamma, a widow's estate on two assumptions : (1) that the property dealt with is, as a matter of fact, the property of the joint Hindu family; and (2) that when Government makes a grant to persons comprising a widow and her relations, Government must always be taken to imply that a widow's estate is intended. The first assumption, as the learned District Judge points out, has been rendered impossible by the Privy Council case in *Venkata Jagannadha* v. *Virabhadrayya* (1). The ruling is to be found on page 655 : "Their Lordships are of opinion that the Full Bench was in error, *i. e., Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (2), that the case of a karnam stands on its own footing and that the principles applicable thereto were properly decided in *Venkata* v. *Rama* (3) by the full Court." Briefly the effect of *Venkata* v. *Rama* (3) is that a service inam does not enure to the benefit of the joint family of the holder, but only of the holder himself. *See* page 271 : "I think it may be taken that such lands were enfranchised in favour not of the family generally, but of the office-holder for the time being." And again at page 259 : "When the emoluments consisted of land, the land did not become the family property of the person apopinted to the office whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emoluments of the officer into whose hands soever the office might pass." And so in *Venkata Jagannadha* v. *Virabhadrayya* (1), the Judicial Committee has laid down that when an inam title deed is granted confirming lands to the holder of the office, his representatives and assigns, the lands are his separate property and are not subject to any claim to partition by other members of the family. This clearly excludes all conception of the joint family in such transactions. In granting an absolute property in the enfranchised inam, Government might have made out the title

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).
2. (1907) I L R 30 M 434 : 17 M L J 101 (F B).
3. (1885) I L R 8 M 249 (F B).

Venkatasubba Rao v. Adinarayana Rao.

deed to one person, or, as in the present case, to six persons, but there is no reason to suppose that they contemplated the joint family which, as shown above, had no interest in the property. For the second assumption, the appellant relies strongly upon a remark in *Abdukuri Venkataramadas* v. *Pachigolla Gavarraju* (4). "In that case the title deed was made out jointly in favour of the widow and the next reversioner which might be taken as an indication that the reversioner should take the estate on the widow's death and not the widow's heirs." Their Lordships do not go so far as to say it must be taken as an indication and it is difficult to see why any such assumption should be made unless it is to be held that Government think in the terms of Hindu Law. When Government state unequivocally "this property shall be your absolute freehold," the meaning is unmistakable and the fact that the document happens to have been issued in India does not import the provisions or the ideas of Hindu Law. I therefore see no reason to traverse the decision of the learned District Judge on this point.

The only other question raised is whether the District Judge erred in law in his fifth paragraph in finding that the diglott register only raised some presumption that Savitriamma's portion in the property was family property inherited from her husband and in refusing to find it conclusively proved in the absence of further evidence I consider the learned Judge's appreciation of this evidence perfectly correct and he was under no necessity in law to accept it as conclusive.

No other point was raised. The appeal accordingly fails on all grounds and is dismissed with costs.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Narayanaswami Pillai ... *Petitioner** (*Plaintiff*)

*v.*

Gopalakrishna Naidu ... *Respondent* (*Defendant*).

Narayanaswami Pillai v. Gopalakrishna Naidu.

*Trustee of temple—Goods supplied to, on behalf of temple—Suit for value of—Decree to be passed in—Personal liability of trustee—Effect on, of his ceasing to be trustee.*

In a suit for the recovery of the price of fire-works supplied by the plaintiff to the defendant as trustee of a temple, *held,* that the mere fact that the defendant had ceased to be trustee did not absolve him from liability to plaintiff.

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*C R P No. 715 of 1923. 13th August, 1925.

4. (1922) 43 M L J 153.

Narayana-swami Pillai *v.* Gopala-krishna Naidu.

The presumption in such a case should be that the creditor lent the money on the personal credit of the trustee, and the proper decree to be passed in such a case is a decree for payment by the defendant personally and out of the temple funds.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Negapatam, dated 19th March, 1923, in S. C. S. No. 107 of 1922.

*M. S. Venkatarama Aiyar* for petitioner.

*Gopalakrishna Naidu* for respondent.

The Court delivered the following

JUDGMENT :—Plaintiff sued defendant for Rs. 95 for fireworks supplied to defendant as trustee of a temple. The District Munsif found the claim to be true, but unsuited plaintiff on the ground that defendant was no longer trustee and the temple was liable. Plaintiff seeks to have the decree reversed. Defendant may have his remedy against the trust, but it cannot be said that he is absolved from all liability to plaintiff by the mere fact that he has ceased to be trustee. " Such a trustee has got his personal credit to pledge and the presumption should be that when he incurred a debt without charging the trust properties, the creditor lent the money on such personal credit." The principle would apply to an ordinary trustee who is not a sanyasi, *Lakshmindrathirtha Swamiar* v. *K. Raghavendra Rao* (1). In *Sundaresan Chettiar* v. *Viswanadha Pandara Sannadhi*(2) it is shown that the proper decree in cases of this sort is a decree for payment by the defendant personally and out of the temple funds.

The defendant does not appear to oppose this petition.

I reverse the decree of the Lower Court and order that a decree do issue as prayed for against the defendant with costs throughout.

A. S. V. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Pazhaniandy Tarakan ... *Appellant** (*Plaintiff*)

*v.*

Murukappa Tarakan and others ... *Respondents* (*Defts.*).

Pazhaniandy Tarakan *v.* Murukappa Tarakan.

*Trusts Act, S. 88—Trustee—Trust property—Suit to recover, in his sole individual right—Maintainability—Trustee's acceptance of trust and acting upon it—Physical possession of property not obtained by him—Effect.*

*S A No. 1635 of 1922. 24th August, 1925.

1. (1920) I L R 43 M 795 at 798.
2. (1922) I L R 45 M 703 : 43 M L J 147.

Pazhaniandy Tarakan *v.* Murukappa Tarakan.

The plaintiff and his family obtained a *saswatam* lease of certain property which was dedicated in trust. The plaintiff was appointed the managing trustee and in pursuance of that appointment he gave notice to the person in possession of the property to deliver it up. The title of plaintiff's transferor was disputed, and subsequently plaintiff purchased the *saswatam* right from the rival jenmi in his own name and instituted the suit out of which the appeal arose for damages for trespass and an injunction. The Court below dismissed his suit on the ground that under S. 88 of the Trusts Act plaintiff was bound to hold the property on behalf of the trust and could not therefore bring a suit in his personal capacity in derogation of the trust.

*Held,* that the Court below was perfectly right in dismissing the suit.

The plaintiff, having accepted the trust and acted upon it, was estopped from disputing the trust. It is not necessary, under S. 88 of the Trusts Act, that the plaintiff should have obtained actual physical possession of the property. Plaintiff is guilty of a breach of trust in suing in his own capacity as being solely entitled to the property.

Second Appeal against the decree of the Court of the District Judge of South Malabar in Appeal Suit No. 652 of 1921, preferred against the decree of the Court of the Additional District Munsif of Palghat in Original Suit No. 415 of 1920.

*P. S. Narayanaswami Aiyar* for appellant.

*K. Bhashyam Aiyangar* and *C. S. Swaminadhan* for respondents.

The Court delivered the following

JUDGMENT :—In this case the plaintiff and his family obtained a *saswatam* lease of certain property which was dedicated in trust. The plaintiff was appointed the managing trustee and in pursuance of that appointment he gave notice to the person in possession of the property to deliver it up. The title of plaintiff's transferor was disputed and subsequently plaintiff purchased the *saswatam* right from the rival jenmi in his own name. He now sues for damages for trespass and an injunction. The Lower Appellate Court dismissed his suit on the ground that under S. 88 of the Trusts Act plaintiff was bound to hold the property on behalf of the trust and could not therefore bring a suit in his personal capacity in derogation of the trust.

The first argument put forward in appeal is that inasmuch as the plaintiff did not obtain actual physical possession of the property, S. 88 does not apply. In S. 88 there is no recital as to the possession of the property and in the cases relied on by the appellant in *Munisami* v. *Maruthammal* (1) and *Srinivasamurthi* v. *Venkata Varada Aiyangar* (2) there is really

1. (1910) I L R 34 M 211 : 20 M L J 687.
2. (1911) I L R 34 M 257 : 21 M L J 669 (P C).

Pazhaniandy Tarakan v. Murukappa Tarakan.

nothing to support this contention. In fact in *Munisami* v. *Maruthammal* (1) it was held that, "If an executor accepts the office and acts as executor with full knowledge of all the circumstances bearing on his right....he is estopped from subsequently repudiating the will." Here the plaintiff accepted the trust and acted upon it and consequently he is now estopped from disputing the trust.

The next point put forward is that the plaintiff is entitled to be reimbursed out of the trust the money which he paid out of his own pocket and that therefore until that is done the property is his own. This is no doubt true and would be applicable in a case where the beneficiaries sought to take the possession out of the plaintiff's hands, but in the present case this is not even a suit against the beneficiaries but a suit against a co-trustee, and when S. 88 lays down that the plaintiff must hold this property for the benefit of the trust I do not think that any Court would allow him to sue in his own capacity as being solely entitled to the property. If he does sue in such capacity he is, in effect, committing a breach of trust. Plaintiff is admittedly in possession of the trust property and can out of it recoup himself what he has spent for the benefit of the trust. Consequently I think that the Lower Appellate Court is quite right in dismissing his suit. The Second Appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SRINIVASA AIYANGAR.

Arumuga Padayachi and others... *Appellants* (Prisoners—Accused Nos.* 1, 2, 5 *and* 7 *to* 11).

Arumuga Padayachi, *In re.*

*Criminal Procedure Code, S. 369—Criminal appeal—Dismissal of—Another appeal by same appellant against same judgment—Maintainability—Review of judgment in criminal matter—Jurisdiction.*

As soon as the judgment of the Court in a criminal matter is signed it becomes final, and the Court is *functus officio.* The Court has no power to review its own judgment on the ground that there has been no formal order issued by the Court or communicated by it to the Lower Court.

Meaning of "judgment" in S. 369 of Criminal Procedure Code.

*Held,* therefore, that, when once a criminal appeal had been dismissed by one Judge of the High Court, another appeal could not be heard at the instance of the same appellant on the ground that on the previous occasion owing to some mistake counsel did not appear for the appellant, and that the fact that there was no formal order issued by the High Court in pursuance of the judg-

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*Cr Appeal No. 151 of 1925. 10th August, 1925.

1. (1910) I L R 34 M 211: 20 M L J 687.

Arumuga Padayachi, *In re.*

ment or the fact that it was not communicated by the High Court to the Lower Court did not affect the question.

Appeal against the order of the Court of Session of the Trichinopoly Division in Case No. 7 of the Calendar for 1925.

*V. L. Ethiraj* and *N. S. Srinivasa Aiyar* for appellants.

*The Public Prosecutor* for the Crown.

The Court delivered the following

JUDGMENT :—In this case I ordered originally that the matter might be posted before a Bench constituted by Venkatasubba Rao, J., and myself, because I was under the impression that the order made by that learned Judge directing notice to the Public Prosecutor amounted, as generally it is understood in criminal matters, to an order admitting the appeal. But I have since ascertained that the learned Judge never intended those words to convey that significance and that as a matter of fact the learned Judge did not admit the appeal and all that he directed notice about was whether once a criminal appeal had been dismissed by one Judge another appeal could be heard at the instance of the same appellant on the ground that on the previous occasion owing to some mistake, counsel did not appear for the appellant. In view, therefore, of there being no order of Venkatasubba Rao, J., admitting the appeal, it has become unnecessary for any matter being heard by a Bench of Judges.

The only question before me, therefore, is whether the learned counsel for the appellant is entitled to be heard with regard to the appeal, that is to say, practically by way of reviewing the judgment previously delivered by me. S. 369 of the Criminal Procedure Code is decisive of the point and there is also the judgment of this Court in *Tadi Somu Naidu and another* (1) in which Odgers and Wallace, JJ. held that as soon as the judgment of the Court in a criminal matter is signed it becomes final and the Court is *functus officio*. The learned counsel for the appellants wished to put it ingeniously in the following way. There was an order by Venkatasubba Rao, J., to the effect that the order of this Court dismissing the appeal should not be communicated to the Lower Court until further orders are made by me. But by some inadvertence and in spite of the order of Venkatasubba Rao, J., the order would appear to have been communicated to the Lower Court. Mr. Ethiraj argues that this was against the order of this Court and, therefore, must be treated as a nullity.

1. (1923) I L R 47 Mad. 428 : 46 M L J 456.

Arumuga Padayachi, *In re.*

Assuming it to be so, it comes to this : Have I the power to review my own judgment on the ground that there has been no formal order issued by the Court or communicated by this Court to the Lower Court ? For this purpose he referred me to the case in *Queen-Empress* v. *Lalit Tiwari* (2) where it was held in a criminal matter that a judgment or order of the High Court is not complete until it is sealed in accordance with R. 83 of the Rules of Court and that up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken. This decision was in 1899 and before the present amendment of S. 369. It is, therefore, very doubtful whether after the present amendment the same Court would have adhered to the conclusion or decision set out in that case. Further, it appears to me that that decision is based upon a rule of the Allahabad High Court about the sealing of orders. I have not been referred to any such rule in this Court. In the absence of any such rule the words of S. 369 of the Criminal Procedure Code are clear and binding. According to that section a judgment when it is signed becomes final. In the absence of any definition to indicate anything to the contrary, a judgment must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must, therefore, indicate only the order of the Court when it is read out and signed by the Judge and cannot be meant to refer to the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court. I must, therefore, hold that when I delivered and signed the judgment it became final and that I have no power now to review my order or alter my judgment in any manner or to any extent.

This appeal petition is, therefore, rejected.

A. S. V. *Petition rejected.*

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2. (1899) I L R 21 All 177.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Addepalli Venkata Gurunadha Ramaseshiah, Acting Secretary of Kannika Parameswari Visamsetty Venkataratnam Hindu High School Committee ... *Appellant* in A. A. O. No.* 256 *of* 1919 *and Respondent in A. A. O. No.* 269 *of* 1919—*Plaintiff*

*v.*

Akella Kesava Ramiah and others ... *Respondents in A. A. O. No.* 256 *of* 1919 *and Appellants in A. A. O. No.* 269 *of* 1919—*Defendants.*

Venkata Gurunadha Ramaseshiah *v.* Kesava Ramiah.

*Transfer of Property Act, S. 6 (e)—Mere right to sue—Transfer of—School managed by a registered Committee—Transfer to another Committee—Debt due on accounts to old Committee—Suit by new Committee—Maintainability—Right to recover money—If offends S. 6 (e).*

A school which was being managed by a Committee registered under the Societies Registration Act of 1860 was subsequently transferred to another Committee. The deed of transfer contained recitals that all the properties had been transferred and possession delivered. The Secretary of the new Committee sued a person who owed moneys to the old Committee on taking accounts. The debtor pleaded that his debt was not mentioned in the schedule of assets transferred and that the suit was not maintainable. *Held*, as the new Committee took over all that the first Committee possessed on behalf of the school, the right of the latter to sue for and recover any amount due to it passed to the new Committee and the plaintiff was therefore entitled to maintain the suit. *Held further*, what was transferred was not a mere right to sue but the debt due by the debtor and therefore the transfer of such a right did not offend against S. 6 (*e*) of the Transfer of Property Act. *Khetra Mohan Das* v. *Biswa Nath Bera*, (1924) I L R 51 C 972 and *Varahaswami* v. *Ramachandra Raju*, (1913) I L R 38 Mad 138 : 24 M L J 298 distinguished; *Glegg* v. *Bromley*, (1912) 3 K. B 474 and *Subhadrayamma* v. *Venkatapathi Raju*, (1924) I L R 48 Mad. 230 : 47 M L J 93 (P C) followed.

Appeals against the order of the District Court of Kistna at Masulipatam in A. S. No. 120 of 1918 preferred against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 4 of 1917.

*T. Ramachandra Rao* and *K. Krishnamachariar* for appellant in A. A. O. No. 256 of 1919.

*A A O Nos. 256 and 269 of 1919. 1st September. 1925.

Venkata Gurunadha Ramaseshiah *v.* Kesava Ramiah

*A. Krishnaswami Aiyar* for respondents in A. A. O. No. 256 of 1919.

*A. Krishnaswami Aiyar* for appellants in A. A. O. No.269 of 1919.

*K. Krishnamachariar* for respondents in A. A. O. No 269 of 1919.

The Court delivered the following

JUDGMENT:—The plaintiff, acting secretary of Sri Kannika Parameswari Visamsetty Venkataratnam Hindu High School Committee, sues for the recovery of Rs. 4,278-5-9 from the defendants who are the sons of one Venkayya Garu. The plaint allegation is that Venkayya managed the affairs of the High School and was in possession of considerable funds and that he rendered an account to the committee of the school, and that on going through the account it was found that the account rendered by him was incorrect and that a sum of Rs. 4,000 and odd was with him and that the defendants who are his heirs are bound to pay the amount to the plaintiff. The defendants raised various contentions and the Subordinate Judge of Bezwada dismissed the plaintiff's suit on the ground that the plaintiff had no cause of action against the defendants. On appeal the District Judge at Masulipatam reversed the decree of the Subordinate Judge and remanded the suit to the Lower Court for taking accounts. Against the decree of the District Judge the defendants have preferred this appeal.

The point for determination in this appeal, is whether the plaintiff has a cause of action against the defendants. The Hindu High School at Bezwada was managed by a Committee called Sri Kannika Parameswari Hindu High School Committee till November, 1915. The Committee was registered under the Societies Registration Act of 1860. Owing to lack of funds or other reasons the Committee transferred the institution and its properties to Sri Kannika Parameswari Visamsetty Venkataratnam Hindu High School Committee which was also registered under the Societies Registration Act of 1860. This transfer is evidenced by Ex. F, dated 28th November, 1915. The contention of the appellants is that when the first committee transferred all its rights to the second committee it did not transfer any outstanding belonging to the first committee and therefore the plaintiff who is the secretary of the second committee is not entitled to sue the defendants for any sum of money that might be found due to the first committee. From the terms of Ex. F it is clear

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that the first committee transferred all its assets and liabilities in connection with the Hindu High School at Bezwada to the second committee. In paragraph 2 the recital is—

"Whereas the members of your Committee applied on 5th September, 1915, praying that the management of Sri Kannika Parameswari Hindu High School at Bezwada and the entire properties thereof be transferred to your committee on condition of your committee discharging the debts due by the said High School Committee and in pursuance of the terms of the memorandum hereto attached. We have agreed thereto and the members of our general committee have passed a resolution No. 8 on 19th September, 1915, to the effect that our general committee should be dissolved, that the management of the School as well as the properties should be transferred to your committee subject to the terms of the said memorandum, etc."

and in the operative portion of the deed there is this clause :

"Therefore in accordance with the said resolution we have hereby transferred to you the management of the School and delivered possession to you of the immoveable and moveable properties belonging to the said School worth about Rs. 30,000 and specified in the schedules of moveable and immoveable properties."

The appellant wants to rely upon the fact in the schedule of assets this debt due from Venkayya is not mentioned ; but from the tenor of the document and from the recitals therein it is quite clear that the entire properties of the school were transferred to the second committee. As the learned Judge remarks though there is no list of debts in the schedule to Ex. F the debts of the old committee incurred in connection with the school were discharged by the second committee. One of the recitals is—

"With this sum and with the sums which might be received hereafter the debts of the School should be discharged."

The second committee did undertake to discharge the debts of the first committee, and, though no list of debts was attached to Ex. F, the second committee was bound to pay all the debts of the first committee. It is not necessary that when one committee transfers all its assets to another committee there should be a list in order to pass the title of the first committee to the second committee with regard to the outstandings. In this case the second committee took over all that the first committee possessed on behalf of the Hindu High School at Bezwada. The right of the first committee to sue for and recover any amount due to that committee did pass to the second committee and the plaintiff is therefore entitled to bring a suit.

The next contention of the appellants is that the first committee had only a right to sue Venkayya and a mere right to sue cannot be transferred by reason of the provisions of

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S. 6 (*e*) of the Transfer of Property Act. The mere right to sue cannot be transferred. Here what was transferred was not a mere right to sue but the debt that was due by Venkayya to the first committee and therefore the transfer does not offend against the provisions of S. 6 (*e*) of the Transfer of Property Act. The plaint as laid contains as averment that Venkayya was indebted to the first committee in the sum of Rs. 3,145-13-8. Venkayya was in possession of the funds belonging to the Hindu High School. He rendered an account which was afterwards found to be false and according to the plaintiff's case Venkayya was in possession of the funds of the committee and therefore he was bound to pay that amount to that committee, and the second committee having taken over the management with the rights and liabilities of the first committee is entitled to sue for and recover the amount due to the first committee. The cases relied upon by the appellant, *Khetra Mohan Das* v. *Biswa Nath Bera* (1) and *Varahaswami* v. *Ramachandra Raju* (2), have no application to the present case. In *Khetra Mohan Das* v. *Biswa Nath Bera* (1) it was held that a right to take accounts and to recover such sums as may be found due is not assignable being a mere right to sue within the meaning of S. 6, cl. (*e*) of the Transfer of Property Act. On the construction of the document and from the way in which the suit as framed it was found that the plaintiff was not entitled to maintain a suit as he had purchased a mere right to sue for account. In *Varahaswami* v. *Ramachandra Raju* (2) it was held that a mere right to recover damages for the negligence of an agent in failing to collect rents cannot be transferred. The mere right to sue for damages is not assignable. In *Varahaswami* v. *Ramachandra Raju* (2) the cause of action was the negligence of the agent. If it was shown that the agent did collect a certain sum of money on behalf of the principal the agent was accountable for the amount actually received by him ; and for what he had with him, he was in the position of a debtor for he had the money of the principal in his hands. The assignment of the amount in the hands of the agent would not offend against S. 6 (*e*) of the Transfer of Property Act. [Vide *Madho Das* v. *Ramji Patak* (3)]. In *Prosser* v. *Edmunds* (4) the Lord Chief Baron held that a naked right to sue was not assignable. In *Hill* v. *Boyle* (5) it was held

1. (1924) I L R 51 C 972. 2. (1913) I L R 38 M 138: 24 M L J 298.
3. (1894) I L R 16 All 286. 4. (1835) 1 Younge and Collyer Ex 481.
5. L R (1867) 4 Eq Cases 260.

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that a mere right to sue a trustee for interest and profits of a trust fund in his hands was not transferable.

The observations of Parker, J. in *Glegg* v. *Bromley* (6) are applicable to the present case. At page 490 the learned Judge observes :—

"It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass."

This observation is quoted with approval by their Lordships of the Privy Council in *Subhadrayamma* v. *Venkatapathi Raju* (7). In that case the plaintiff's husband advanced certain sums of money for litigation to the defendant on the express agreement that the money borrowed from the plaintiff should have a charge upon the moveable and immoveable properties obtained by means of the litigation. Owing to the disputes between the plaintiff and the defendant the plaintiff refused to advance any further moneys. After a time the suit was compromised and the lender's widow claimed that the advance and the interest thereon were a charge on the money paid under the compromise. The Privy Council held that the plaintiff was entitled to a charge on the amount obtained on compromise in the suit. Their Lordships held that the agreement was an assignment of part of the fruits of the litigation, and even if they were to be regarded as non-existing property at the date of the agreement, the agreement attached upon the money being paid. The principle is that if a certain sum of money is due from any person that sum is recoverable on assignment ; and if it is to be ascertained only on taking accounts it might be that the right to take the account is not assignable ; but where the allegation is that the defendant is in possession of funds belonging to a person or that the defendant is accountable for a definite sum of money to a person such a claim is transferable. In such a case the right to recover the money is not a mere right to sue and the transfer of such a right does not offend against S. 6 (*e*) of the Transfer of Property Act. In the result the appeal is dismissed with costs.

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6. (1912) 3 K B 474.
7. (1924) I L R 48 Mad 230 : 47 M L J 93 (P C).

Venkata Gurunadha Ramasoobiah *v.* Kesava Ramiah.

*A. A. O. No.* 256 *of* 1919 :—In view of our judgment in A. A. O. No. 269 of 1919 the appellant does not press this appeal. It is dismissed with costs.

T. S. V. *Appeals dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI.

B. Raja Rajeswara Muthuramalinga Sethupathi Avergal, Rajah of Ramnad ... *Petitioner* (1st respondent —Plaintiff)*

*v.*

The Secretary of State for India in Council, represented by the Collector of Ramnad and another ... *Respondents (Petitioner and 2nd respondent—Nil and defendant).*

Raja Rajeswara Muthuramalinga Sethupathi Avl. *v.* Secretary of State for India.

*Civil Procedure Code, O. 23, R. 3—Compromise between parties to suit—Petition by them to record compromise and to pass decree in terms thereof—Procedure on—Petition by third party attacking compromise and praying to be added as party to suit—Order making him party without deciding validity of compromise—Validity—Power to add third party if compromise valid—Local Boards Act, S. 38—Resolution of Union Board—Contracts made in pursuance of —Validity—Subsequent rescinding by Government of such resolution—Effect.*

In a suit filed by the Rajah of Ramnad against the Union Board of Ramnad for a declaration that certain streets around his palace belonged to him and were not vested in the Union Board, a compromise was entered into between the Rajah and the Union Board, after a resolution of the Union Board authorising the same. A joint petition was put in under O. 23, R. 3, Civil Procedure Code, praying for the passing of a decree in terms of the compromise.

Long after the said joint petition was put in, but before any order was passed thereon, the Government, purporting to act under S. 38 of the Local Boards Act, rescinded the resolution of the Union Board to enter into a compromise. On the day the joint petition came on for hearing, the Secretary of State for India in Council put in a petition to be made a party to the suit, and the District Munsif, without deciding the petition already filed to record the compromise, passed an order making the Secretary of State for India in Council a party to the suit.

*Held* that, if the compromise between the Union Board and the plaintiff was a lawful and valid one, the Munsif had no power to add any party but was bound to pass a decree in terms of the compromise, and that his order making the Secretary of State for India in Council a party without deciding the validity of the compromise entered into between the parties to the suit was clearly premature.

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* C. R. P. No. 607 of 1924. 12th March, 1925.

Raja Rajeswara Muthuramalinga Sethupathi Avl. *v.* Secretary of State for India.

*Quaere*: Whether S. 38 of the Local Boards Act by necessary implication renders invalid all contracts based upon a resolution of the Union Board subsequently rescinded by the Government under that section.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Ramnad, dated 15th August, 1924, in I. A. No. 475 of 1924 in O. S. No. 8 of 1924.

*A. Krishnaswami Aiyar* for petitioner.

*The Government Pleader* for respondents.

The Court delivered the following

JUDGMENT :—This is an application to revise the order of the District Munsif of Ramnad directing the Secretary of State for India in Council to be made a party to the suit which was filed by the Rajah of Ramnad against the Union Board of Ramnad for a declaration that certain streets around his palace belong to him and are not vested in the Union Board. Trouble seems to have arisen from the fact that during the survey under the Survey Act these roads were classified as public streets. The suit, however, as appears from the note of the District Munsif, was not a suit under the Survey Act but was a suit by the plaintiff to establish his title to the roads. There was a compromise entered into between the Rajah of Ramnad and the Union Board and this compromise was entered into after a resolution of the Union Board. A joint petition was put in under O. 23, R. 3 of the Civil Procedure Code on the 26th of April, 1924, where it was stated that the parties had come to an agreement and that a decree should be passed in terms of the *razinamah*. By that *razinamah* the defendant Board recognised the ownership of the plaintiff over the lanes A, B and C mentioned in the Commissioner's plan; the plaintiff was to allow the public free use of the lanes from 5 A. M. till 9 P. M. for ever ; and the plaintiff was given the right to close the lanes except during the hours when the public were allowed access ; each party was to bear its own costs. It was prayed that a decree be passed in terms of this *razinamah*. This petition was put in on the 26th of April but no order was passed on it. It appears from the affidavit filed on behalf of the Secretary of State for India in Council that the Government on the 4th of July, 1924, long after this petition was presented, and purporting to act under S. 38 of the Local Boards Act rescinded the resolution of the Union Board to enter into a compromise. On the date the petition to record

Raja Rajeswara Muthu-ramalinga Sethupathi Avl. v. Secretary of State for India.

the compromise came on for hearing, the Secretary of State for India in Council put in a petition to be made a party to the suit and the District Munsif without deciding the petition already filed to record the compromise passed an order making the Secretary of State for India in Council a party to the suit. The present revision petition is filed against that order.

The contention of Mr. Krishnaswami Aiyar for the petitioner is that, under O. 23, R. 3, Civil Procedure Code, the Court was bound to pass a decree in terms of the compromise, such compromise being legal and valid and that it was not competent to the Court to add a party to the proceedings where the original parties terminated the suit by a lawful compromise. Order 23, R. 3 runs as follows :—

> "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

It seems to me to be clear that if this compromise between the Union Board and the plaintiff was a lawful and valid one, the District Munsif had no power to add any party but he had only power to pass a decree in terms of the compromise.

*Sankaralinga Nadan* v. *Raja Rajeswara Dorai* (1) has no application. In that case the defendants, who were Shanars, were sued as representing their community. The High Court found that the compromise after decree passed in favour of the trustee by the Subordinate Judge was a breach of trust on the part of the trustee and that third parties interested were entitled to intervene. Their Lordships of the Privy Council upheld the order of the High Court. In the present case there is no such charge and the suit is not filed by or against either party in a representative character.

The fact that the petitioner claims a right or interest in the matter cannot, if the suit was terminated lawfully by the original parties thereto, allow third parties to agitate their rights in the suit. If third persons have any interest in the matter, their remedy is to file a separate suit The District Munsif has passed no orders on the validity of the compromise and I think that the order which he has passed making the Secretary of State for India in Council a party is clearly premature. The first question to be determined was whether the compromise was legal. On this part of the case I have heard

1. (1908) I L R 31 M 236 : 18 M L J 387 (P C).

Raja Rajeswara Muthu-ramalinga Sethupathi Avl. *v.* Secretary of State for India.

the arguments both of Mr. Krishnaswami Aiyar for the petitioner and of Mr. Anantakrishna Aiyar for the Secretary of State. Mr. Krishnaswami Aiyar argues that the Local Boards Act constitutes the defendant, the Union Board of Ramnad, as a corporation with all rights of suing or being sued, or acquiring, holding or transferring property, moveable or immoveable, or to contract and do all other things which it considers proper or expedient for the purposes for which it was constituted. The streets vested in the Board under the Act and that Board was, having regard to the allegations in the plaint, the proper party to be impleaded. The contract therefore which resulted in the *razinamah* was a contract entered into by a body which had authority to enter into the contract. Such being the case there could be no question of the contract not being enforceable. It is contended by him that the provisions of S. 38 of the Act, which gives the Government the power to suspend or cancel any resolution of the Local Board, can only be exercised so long as the matter rests in the stage of a mere resolution which as between the Board and the Government the Government can interfere with, and that so long as the rights of third parties are validly created under a contract which cannot be impeached on the ground of fraud or misrepresentation or *ultra vires,* the contract is enforceable irrespective of what the Government may do under S. 38. Reference has been made to the decisions in *Allen* v. *Gold Reefs of West Africa* (2); *British Murac Syndicate, Ltd.* v. *Alperton Rubber Company, Ltd.* (3) and *Baily* v. *British Equitable Assurance Company* (4) and to Vol. VIII of Halsbury's Laws of England, p. 384. It is argued by Mr. Anantakrishna Aiyar that S. 38 by necessary implication renders all contracts invalid where such contracts are based upon the resolution which has been set aside by the Government; in other words, that all contracts which are entered into by Local Boards will, by virtue of S. 38, be of no effect if the Government later on rescind the resolution by virtue of the powers vested in them under that section which gives no time within which the contract may be rescinded. This would really mean that all contracts are liable to the risk of being cancelled at any period irrespective of the rights of the parties. As at present advised, I am not prepared to concede so wide a proposition, but it is unnecessary for me to give any decision on the point at this stage of the proceedings especially as any decision

2. (1900) 1 Ch D 656. 3. (1915) 2 Ch D 186. 4. (1904) 1 Ch 374.

passed by me on this point would not be subject to an appeal. If the case goes to the District Munsif for adjudication as to the validity of the compromise and should he pass any order one way or the other, it would be subject to an appeal. As it is, it is difficult to uphold the order of the District Munsif who adds a party without determining whether the compromise has put an end to the suit. There is no question about the effective addition of parties. I also refrain from saying whether should he hold that the compromise is invalid, this is a case in which the Secretary of State for India in Council should be made a party.

The result is that the order of the District Munsif is set aside and the case remanded for disposal in the light of the observations made above. Costs will abide and follow the result.

A. S. V. *Order set aside : Case remanded.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras .. *Referring Officer**

*v.*

Sri Krishna Chandra Gajapathi Narayana Deo, Rajah of Parlakimedi. ... *Assessee.*



*Income-tax Act (XI of 1922), S. 9, sub-sec. 1(7)—Construction—Vacancies—Meaning—House kept ready for owner's use but not resided in by him—His liability for assessment in respect of—S. 34—Applicability—Escaped assessment—Meaning—Income-tax Manual—Authority of.*

If a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so, he is assessable under S. 9, sub-sec. 1 (7) of the Indian Income-tax Act (XI of 1922), though he may not reside in it one day in a year.

*Quaere* : Whether the sub-section only applies to property which is usually let to a tenant.

The expression "escaped assessment" in S. 34 of the Indian Act applies to cases where the Income-tax Officer has deliberately adopted an erroneous construction of the Act just as much as to a case where the officer has not considered the matter at all, but simply omitted the assessable property from his view and from his assessment.

The Income-tax Manual is merely a document for the guidance of officials.

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*R C Nos. 3 of 1924 and 8 of 1925. 17th August, 1925.

Commissioner of Income-tax, Madras *v.* Sri Krishna Chandra Gajapathi Narayana Deo.

Cases stated under S. 66 (2) of the Income-tax Act by the Commissioner of Income-tax referring the following questions for the decision of the High Court :—

(1) Whether the interest on arrears of rent charged by a landholder to his tenants is "agricultural income" within the meaning of S. 2 (1) (*a*) of the Income-tax Act ?

(2) Whether income which the Assessing Officer in 1922-1923 deliberately refrained from taxing can be taxed in 1923-1924 under S. 34 of the Income-tax Act ?

(3) Whether under S. 9, cl. (1), sub-clause (*vii*) of the Income-tax Act (XI of 1922), the buildings mentioned in the schedule to his letter No. 102 of 1924, dated 16th March, 1925, are exempt from income-tax for the period found vacant ?

*M. Patanjali Sastri* for Referring Officer.

*T. R. Ramachandra Aiyar* for *L. A. Govindaraghava Aiyar* for Assessee in R. C. No. 3 of 1924.

*L. S. Veeraraghava Aiyar* for Assessee in R. C. No. 8 of 1925.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—The short point here is whether certain bungalows which belong to the Rajah of Parlakimedi are or are not assessable under S. 9 of the Indian Income-tax Act (XI of 1922). The sub-section material to this question is sub-section 1 (7) :—

> "In respect of vacancies such sum as the Income-tax Officer may determine, having regard to the circumstances of the case, is to be the tax payable by the assessee."

The question we have to determine is what the section means by "vacancies". The executive authorities have issued for the guidance of their officers a Manual and this case has been put forward in the form of asking us to say whether S. 32 of the Manual is in consonance with the words of the Act. Ordinarily we should not view the matter from that point of view because the Manual, which is called notes of instructions, is obviously merely a document for the guidance of officials. All we have to determine is two short questions: first, whether these bungalows in the circumstances of the case can be described within the meaning of the section as being vacant. The second question which I shall deal with separately in a moment is whether the assessment in this case can be made retrospective for one year under the provisions of S. 34. To take the

Commissioner of Income-tax, Madras *v.* Sri Krishna Chandra Gajapathi Narayana Deo.

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first question, the Manual says outright that the sub-section only applies to property which is usually let to a tenant. Without deciding whether that is correct or not and whether a man who had a house that he never let, but who dismantled it and locked it up for the year would or would not be assessable, it is clear that these houses are in fact never let. The description of the case stated by Mr. Strathie is quite clear. " Bungalow No. 1 is kept by the Rajah as a guest-house for Government Officers and others visiting Parlakimedi. Bungalow No. 2 is only used by the Rajah or his officers visiting Berhampore. Bungalow No. 3 is occupied only about two months in the year when the Rajah visits Madras during the season. Bungalow No. 4 is occupied during the hot weather " obviously by the Rajah. It is clear from the way in which the case is framed that the contention put forward was that, although these bungalows were ready for occupation and therefore must necessarily have been equipped with the furniture necessary for the occupation of the Rajah, they are not assessable if, in fact, it so happened in any one year that they were not lived in by the Rajah or the other persons in question, guests or officers of the Rajah's staff. In my opinion there is nothing in the section to warrant that construction and if a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so—and there is a statement here that not only was that the case but that servants of the Rajah were actually kept on the premises in order to get it ready for occupation whenever he wanted to go there—he is assessable. In these circumstances I think that the case falls within the exact words of Lush, J. in *Queen* v. *The Assessment Committee of St. Pancras* (1). The words are to be found at p. 588 where the learned Judge says this :—

> "If, however, he (that is, the owner) furnishes it (that is, the vacant house) and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in the year."

That seems to me to be conclusive and I respectfully agree with that view and think that that is the proper construction of the statute. In my opinion, therefore, the assessee is liable for assessment in respect of all the bungalows referred to in the case.

The next point is whether the assessment can be made retrospective. It appears that in the previous year the Income-tax Officer had to consider the question and come to the

1. (1877) 2 Q B D 581.

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Coutts Trotter, C. J.

conclusion that the Rajah was not assessable in respect of these bungalows. The section of the English Act of 1918, S. 125, is quite clear, because it provides expressly for the case where an allowance or exemption or abatement unauthorised by the Act has been deliberately made by the predecessor of the surveyor with whom the section is concerned. The Indian Act (S. 34) is not quite so explicit. What it says is this :—

"If, for any reason, income chargeable with income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, within a year, serve a notice."

It is said that "escaped assessment" must mean not that the question has been considered and decided in favour of the assessee, but that the Income-tax Officer has omitted to consider the question at all or was unaware of the existence of the property now sought to be taxed and therefore passed it over and that it does not apply to cases where the Income-tax Officer on consideration came to the conclusion, *ex hypothesi*, an erroneous conclusion, that the property in question was not assessable. It seems to me that construction is forbidden by the alternative case put in the section :—

"Where the income . . . . . . . . . has been assessed at too low a rate."

That cannot be a matter of mere inadvertence, that must refer to a deliberate assessment made by the Income-tax Officer in the preceding year with knowledge of the facts and circumstances. It appears to me that a similar view must be taken of the previous words "escaped assessment" and that it applies to cases where the Income-tax Officer has deliberately adopted an erroneous construction of the Act just as much as to a case where the officer has not considered the matter at all, but simply omitted the assessable property from his view and from his assessment. In my opinion the questions referred to us must both be answered adversely to the assessee and it must be held that the property referred to us is not property describable as vacant during the year of assessment and that there is nothing in the statute to prevent the assessing officer from recovering income-tax for the previous year as allowed by S. 34.

Rs. 150 will be allowed for costs in each case.

*Beasley, J.* :—I agree.

A. S. V. *Two questions answered in affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE ODGERS.

B. S. Mahadeva Aiyar and others ... *Appellants** (*Defendants* 10, *6 and* 7)

*v.*

Ramakrishna Reddiar and others ... *Respondents* (*Plaintiffs and* 1 *to* 4 *defendants*).

Mahadeva Aiyar *v.* Ramakrishna Reddiar.

*Partnership—Partner—Part-payment to save limitation—Power to make—Dissolution—Power before and after—Limitation Act, S.* 21 (2)*—Express authority to make payment after dissolution—Payment in pursuance of—Effect on other partners—Dissolution of firm—Notice to strangers and old customers—Necessity—Contract Act, Ss.* 263 *to* 265.

So long as a partnership continues, it is a part of the ordinary course of partnership business to pay partnership debts, and therefore it would ordinarily be sufficient to prove that the debt in question was a partnership debt and that the person who paid the interest on it or part of the principal was a partner in order to give an extended period of limitation calculated from the date of payment as against all the other partners.

Even after dissolution, S. 263 of the Contract Act provides that the rights and obligations of the partners continue in all things necessary for winding up the business, and from S. 265 it appears that payment of the firm's debts is part of the business of winding up.

So far as strangers are concerned, a partnership dissolved is a partnership in being, unless and until they receive notice of dissolution. In the case of old customers, express notice is necessary.

A partnership between defendants 1 and 5 was dissolved as from 11th March, 1915, in a suit for dissolution brought by defendant 5. The plaintiffs were old customers of the firm and held a promissory note in favour of their deceased father, which had been executed on 26th August, 1914, by the 1st defendant in his capacity as managing partner. In a suit brought by them on the said promissory note, it appeared that the suit would be barred but for a payment of Rs. 1,000 for interest made on 16th August, 1917 by the 1st defendant and endorsed by him on the note. Defendant 5 pleaded that the partnership having been dissolved long before 16th August, 1917, the 1st defendant had no authority to bind defendant 5 by an endorsement of part payment in order to save limitation.

It, however, appeared from the evidence that the plaintiffs had no notice, express or constructive, of the dissolution on 16th August, 1917, that defendant 1 had express authority to make the part payment, and that, in fact, the payment was a joint payment by defendants 1 and 5.

*Held,* that the circumstances of the case were sufficient to fix defendant 5 and his heirs with liability and to save limitation.

Effect of S. 21 (2) of the Limitation Act and of the Full Bench decision in *Veeranna* v. *Veerabhadraswami,* (1918) I L R 41 M 427.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O. S. No. 38 of 1920.

*Appeal No. 90 of 1922. 27th February, 1925.

Mahadeva Aiyar v. Ramakrishna Reddiar.

*A. Krishnaswami Aiyar* and *K. Krishnaswami Aiyangar* for appellants.

*The Advocate-General, A. Venkatarayaliah, L. Venkatanarasiah* and *A. N. Krishna Aiyangar* for respondents.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—In this case the plaintiffs are the sons of one S. V. Manavala Reddiar who died about 1915 and they sue the defendants who are, as to defendants 2 to 4, the undivided sons of defendant 1 and as to defendants 6 and 7, the undivided sons of defendant 5. Defendant 1 and defendant 5 carried on business in partnership in cotton and money-lending under the style of "P.K.N."Firm. Defendant 1 borrowed from Manavala Reddy Rs. 10,000 from his family funds, in his (defendant 1's) capacity as managing partner on 26th August, 1914. The suit is brought on the promissory note executed thereupon (Ex. A). Defendant 1 is also alleged to have made and endorsed a payment of Rs. 1,000 for interest on 16th August, 1917, thus saving limitation. The defence is that the partnership between defendant 1 and defendant 5 had ceased to the knowledge of plaintiffs long before 16th August, 1917, and had been dissolved by a decree in a suit for dissolution (O. S. No. 7 of 1918) brought by defendant, 5 the capitalist partner, against defendant 1. The decree decided that the partnership was dissolved as from 11th March, 1915. Consequently defendant 1 had no authority to bind his former partner in 1917 by an endorsement of part payment in order to save limitation. It is no doubt clear law that after dissolution no ex-partner has power to do any act to bind another ex-partner. Cf. *Watson* v. *Woodman* (1) where the Vice-Chancellor held that it was not there proved that the two parties concerned had so intended that they should for the purposes of that suit be deemed to have continued partners. In *Rajagopala Pillai* v. *Krishnaswami Chetty* (2) it was held that the fact that a partnership is being wound up is by itself insufficient to authorise a surviving partner to bind the representatives of a deceased partner. But in the present case it is clear that as regards third parties (in the position of the plaintiffs) there was no notice, express or constructive, given of dissolution and S. 264 of the Contract Act is clear that in the absence of such notice, persons dealing with a firm are entitled to assume that the partnership still continues. [*Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (3), *Gorio* v. *Vallabhdas* (4)].There-

1. (1875) 20 Eq Cases 721.
2. (1898) 8 M L J 261.
3. (1882) I L R 8 C 678.
4. (1915) 17 Bom L R 762.

Mahadeva Aiyar v. Ramakrishna Reddiar. — Odgers. J

fore plaintiffs were still entitled even after 1915 to regard the partnership between defendant 1 and defendant 5 with whom they have dealt for 15 years as subsisting. The question then arises, had defendant 1 authority to bind his firm by making this payment. My own opinion is that, as in the case of a mercantile firm as here, each partner is entrusted by his co-partners with a general authority to do any act necessary for or usually done in carrying on the business of such partnership, a partner's authority extends to making an acknowledgment by part-payment so as to bind his partners. I am fortified in this opinion by that of Kumaraswami Sastri, J., in his referring judgment in *Veeranna* v. *Veerabhadraswami* (5). However a question has been raised on limitation with regard to the provisions of S. 21 (2) of the Limitation Act which runs as follows :—

"Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them."

These words have been construed in *Veeranna* v. *Veerabhadraswami* (4) by the Full Bench of this Court. There the learned Judges say :—

"It is important to notice the exact wording of S. 21 (2) of the Limitation Act. The section does not say that a person shall not be liable on an acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner ; and it amounts to saying that if you have no more than a written acknowledgment signed by one defendant, the fact that the other defendant is his partner cannot affect the latter's liability. You could obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own ; but for the sub-section, proof of the acknowledgment would be sufficient to fix the other partner with liability, a conclusion manifestly repugnant both to sense and justice."

Here there is no question that that part-payment was in respect of a partnership debt (Ex. A). There is also ample evidence from the surrounding circumstances which we are entitled to look at [*Veeranna* v. *Veerabhadraswami* (5)] for the conclusion that there was express authority for defendant 1 to make the acknowledgment to rebut the possible validity of the contention that from the wording of S. 21 (2), Limitation Act, there is no presumption in India that a partner has power to acknowledge though the validity of this contention is at least doubtful after the exposition of the sub-section by the

5. (1918) I L R 41 M 427 at 431 : 34 M L J 373 (F B).

Mahadeva Aiyar v. Ramakrishna Reddiar.

Odgers, J.

Full Bench. P. W. 3, a clerk of appellants' (defendants') firm, swears that the entry in Ex. E (1) showing the payment of Rs. 1,000 on 16th August, 1917, was made under the orders of defendants 1 and 5 ; he also states that the partnership has not been wound up or the accounts settled. Defendant 5 himself applied for a loan to the South Indian Bank in 1915 (Ex. G) in which he sets out the present loan. Ex. H is the defendant 5's plaint in the dissolution suit against defendant 1. He says that since his (defendant 5's) father's death in 1907, defendant 1 and another assistant partner conducted the entire business. Defendant 5 was obliged to rely on defendant 1 for the conduct by him of all matters connected with the partnership and all such things as the collection of outstandings, etc. In Ex. F, dated 6th February, 1918, the present appellant admits that defendant 1 has to pay a share of the debt due to Manavala Reddy. There is also a correspondence between the Receiver in the dissolution suit and the vakil of Manavala Reddi's sons which shows that at first at any rate the appellants were willing to discharge their half of the suit debt and did not question their liability to do so. There is no doubt on the evidence, which there is no reason to discredit, that never until this suit was brought did appellants dispute their liability nor suggest that defendant 1 was not authorised to make the acknowledgment. The proviso of S. 21 (2) of the Limitation Act as construed by the Full Bench can therefore have no application to the present case. I am therefore of opinion that the Subordinate Judge was correct in the conclusion he came to and I would dismiss this appeal with costs of plaintiffs (respondents 1—3). Costs not to come out of partnership assets.

Spencer, J.

*Spencer, J.* :—I agree that the appeal must be dismissed with costs and I will give my reasons in my own language. Defendants 6 and 7 are sons of the 5th defendant, who died during the suit under appeal and 10th defendant is the Receiver in O. S. No. 7 of 1918.

From the terms of the reference in *Veeranna* v *Veerabhadraswami* (5) it appears that the Full Bench had not to consider the effect of S. 21 (2) of the Limitation Act upon acknowledgments of debts and payments saving limitation by partners with express reference to the circumstance of the partnership being a continuing one or one that had been dissolved at the time of acknowledgment or payment. The learned Judges

5. (1918) I L R 41 M 427 : 34 M L J 373 (F B).

Mahadeva Aiyar *v.* Ramakrishna Reddiar.

Spencer, J.

observed that they saw nothing in the sub-section to make it necessary to suppose that it was intended to apply to transactions conducted in the ordinary course of partnership. They overruled *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar* (6). So long as a partnership continues, it is a part of the ordinary course of partnership business to pay partnership debts, and therefore it would ordinarily be sufficient to prove that the debt in question was a partnership debt and that the person who paid the interest on it or part of the principal was a partner in order to give an extended period of limitation calculated from the date of payment as against all the other partners. Even after dissolution, S. 263 of the Contract Act provides that the rights and obligations of the partners continue in all things necessary for winding up the business, and from S. 265 it appears that payment of the firm's debts is part of the business of winding up. But after a partnership has become dissolved, it may not be the particular duty of every person who has been a partner to pay and acknowledge debts of the firm, as by arrangement that may be done by the Court, or by a Receiver or by one of the ex-partners acting as agent for the others. So far as strangers are concerned, a partnership dissolved is a partnership in being, unless and until they receive notice of dissolution. In the case of old customers, like the plaintiffs in this case, express notice is necessary [vide *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (3) and Pollock and Mulla's commentary on S. 264]. It has not been proved by the evidence in this case that the plaintiffs received any notice of the partnership of defendants 1 and 5 having become dissolved on 11th March, 1915 or indeed on any date before 16th August, 1917, when the payment of Rs. 1,000 was made by 1st defendant to 2nd plaintiff according to his evidence as P. W. 4 and the ledger, Ex. E (1). For some unaccountable reason no issue as to limitation was directly raised in the Lower Court. P. W. 3, who was a clerk of the firm, says that the firm's business was closed on 14th Thai, Rakshasa, corresponding to 27th January, 1916, but 7th defendant who, as authorised agent of his father, 5th defendant, brought O. S. No. 7 of 1918 on the file of the Sub-Court of Ramnad against 1st defendant to obtain a declaration that the partnership terminated on 11th March, 1915, did not present the plaint in that suit to the Court before 1st February, 1918 (*see* Ex. H). In paragraph 11 of the plaint

3. (1882) I L R 8 C 678. 6. (1908) I L R 32 M 421.

Mahadeva Aiyar v. Ramakrishna Reddiar.

Spencer, J.

the 5th defendant states that he was dependent on the 1st defendant for all matters connected with the business of the firm, such as the collection of outstandings even after 10th March, 1915, pending the settlement of the accounts.

Fifth defendant in Ex. G, a loan application made to the South Indian Bank, and 7th defendant in his affidavit (Ex. F) and in his letter (Ex. D-2) to the Receiver admitted that the debt due to the plaintiffs was a partnership debt of the P. K. N. Firm, and P. Ws. 3 and 4 deposed, without being contradicted or shaken in cross-examination, that the payment of Rs. 1,000 was a joint payment by both 1st and 5th defendants and that the entry in the accounts was made under the authority of both of them. This is quite enough to fix all the appellants with liability and to save limitation. I agree in the proposed order for costs.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Sree Rajah Vadrevu Viswasundara Rao Bahadur, Zamindar Garu ... *Appellant in all appeals**

*v.*

Vannam Paidigadu, minor, by mother and Soori and others ... *Respondents.*

Sree Rajah Vadrevu Viswasundara Rao Bahadur v. Vannam Paidigadu.

*Limitation Act, Art. 180—Decree—Execution—Purchaser of immoveable property at the auction-sale—Application for delivery of possession—Period of limitation—Prior order for delivery—Default of purchaser in taking delivery—Effect of.*

An application for delivery of possession of immoveable property purchased by a person at a sale held in execution of a decree falls under Art. 180 of the Limitation Act and must be made within 3 years of the date when the sale becomes absolute. The fact that during that period an order for delivery had been passed but delivery was not effected owing to his own default does not extend the period of limitation. C M S A No. 75 of 1916 and the opinion of *Oldfield, J.* in *Nandur Subbayya* v. *Sri Venkataramayya Apparao Bahadur* (1918) M W N 214 followed ; opinion of *Abdur Rahim, J.* in *Nandur Subbayya* v. *Sri Venkataramayya Apparao Bahadur,* (1918) M W N 214 dissented from.

Appeals against the decrees of the Court of the Subordinate Judge of Cocanada in Appeals Nos. 27, 26 and 28 of 1922 preferred against the orders of the Court of the District Munsif of Cocanada in C. M. Ps. Nos. 1618, 1617 and 1620 of 1921 in S. C. Suits Nos. 107, 106 and 110 of 1916 on the

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*A. A. A. O. Nos. 55, 130 & 70 of 1923. 24th July, 1925.

Sree Rajah Vadrevu Viswasundara Rao Bahadur *v.* Vannam Paidigadu.

file of the Court of the Deputy Collector, Head-quarters Division, Cocanada, respectively.

*K. Kameswara Rao* for appellant.

*P. Somasundaram* and *Y. Gangaraju* for respondents.

The Court delivered the following

JUDGMENT :—The only point involved in this appeal is whether Art. 180 is applicable to an application by the purchaser of immoveable property at a sale in execution of a decree for delivery of possession, or Art. 181.

The appellant purchased property in execution of a decree and the sale was confirmed on 29th June, 1918. The application out of which the present appeal arises was made on 30th July, 1921. Both the District Munsif and the Subordinate Judge have held that the appellant's application is barred by limitation under Art. 180 of the Indian Limitation Act. It is contended by Mr. Kameswara Rao before us that an application for execution was made in June, 1920, and the District Munsif ordered that the property sold should be delivered to the purchaser and that this order was not carried out by the Court and therefore should be considered to be in force. He urges that when a Court passes an order for delivery it is the duty of the Court to see that the delivery takes place, and he relies upon the wording of O. 21, R. 95, and contends that the words "the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property" lay upon the Court the duty to see that delivery takes place. O. 21, R. 95 makes it obligatory on the Court to make an order for delivery on an application by the purchaser. The Court is not bound to see that delivery is actually effected, for delivery may not take place notwithstanding the order of the Court by reason of a third person being in possession or by some resistance offered by a person entitled to object to delivery, or the delivery cannot take place owing to misdescription or wrong description or owing to the absence of the purchaser or his man. In this case the application of June, 1920, was dismissed as the warrant of delivery was returned unexecuted as there was no one to take delivery. The contention that the order for delivery is in force till actual delivery takes place is not supported by the wording of O. 21, R. 95, or by any decided case. The contention that when an order for delivery is made that order is to remain in force till actual delivery takes place is tantamount to saying that an

Sree Rajah Vadrevu Viswasundara Rao Bahadur *v.* Vannam Paidigadu.

order for delivery is a decree which can be kept alive by periodical applications. To uphold this contention would be to apply Art. 182 to orders passed for delivery. Art. 180 is clear in its terms. It gives three years' time for making an application for delivery of possession from the date when the sale becomes absolute. When there is a specific provision applicable to the case, it is not proper to overlook that Article and apply Art. 181 of the Limitation Act which is a residuary Article applicable to cases not provided for elsewhere in the First Schedule to the Limitation Act or by S. 48 of the Code of Civil Procedure.

There is only one reported decision of this Court on this point [*Nandur Subbayya* v. *Sri Venkataramayya Apparao Bahadur* (1)] and the learned Judges who decided that case took different views on the question. Abdur Rahim, J., held that in a case like this Art. 181 is the proper Article to apply. His view is that when an application for delivery of possession is made and the Court passes an order for delivery that order should be considered to be in force till actual delivery is effected and he holds that if the Court wanted to dismiss the application it should give notice to the applicant to show cause why the order for delivery of possession should not be dismissed, and that if no notice is given to the auction-purchaser to show cause why his application should not be dismissed, the dismissal should be considered as shelving the petition for statistical purposes. Where the Court is unable to give effect to its order by reason of the absence of the petitioner, who is bound to be present in order to take delivery, or owing to causes over which he has control, it is not the duty of the Court to give notice to show cause why the petition should not be dismissed. It would be different if the delivery was obstructed by the judgment-debtor ; if owing to anything that the judgment-debtor does or owing to causes which are beyond the control of the auction-purchaser, the delivery is not effected, it may be said that the order for delivery remains in force and a subsequent application to execute that order is a valid application even if that application may be more than three years after the date of the sale being made absolute. Oldfield, J., took the view that Art. 180 was the proper Article applicable to the case. He observes at page 218 :

"It has been recognised in a long series of cases [*Thakur Prasad* v. *Abdul Hasan* already referred to, (1921) 23 All. 13] that a decree-holder's

1. (1918) M W N 214.

proceedings can only be held to be legally continued when the interruption to them was not occasioned by any fault of his own but either by successful objection of a judgment-debtor, or a third party, or by some obstacle interposed by the Court."

Sree Rajah Vadrevu Viswasundara Rao Bahadur *v.* Vannam, Paidigadu.

With very great respect we are unable to follow the reasoning of Abdur Rahim, J. and we respectfully adopt the reasoning of Oldfield, J. Oldfield, J. and Bakewell, J. held in a similar case that Art. 180 was the proper Article applicable to the case in C. M. S. A. No. 75 of 1916. The decision in *Jit Mal* v. *Jwala Prasad* (2) has no application to the present case. In that case the arrest of the judgment-debtor could not be effected as he concealed himself. It was held that the application was pending as the arrest could not be effected owing to the conduct of the judgment-debtor. But where owing to the default or laches of the auction-purchaser delivery of possession could not be effected, the Court would be justified in dismissing the application for delivery of possession even though an order for delivery has been made. Art. 180 was enacted in the Act of 1908 and the Article is clear in its terms. There is no warrant for extending the period of limitation by applying Article 181 to a case where owing to the auction-purchaser's default delivery could not be effected. We hold that Art. 180 of the Limitation Act has been properly applied to the facts of the case and we dismiss this appeal with costs.

The point involved in C. M. A. No. 130 of 1923 is the same and the judgment in this appeal governs that case also. C. M. A. No. 130 is dismissed with costs for the reasons given in our judgment in C. M. A. No. 55 of 1923. C. M. A. No. 70 of 1923 is dismissed without costs.

T. S. V. *Appeals dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

K. Venkatanarasimha Rao ... *Petitioner** (*1st deft.*)

*v.*

Hemadri Suryanarayana ... *Respondent* (*Plaintiff*).

*Civil Procedure Code, S. 141 and O. 9—Scope of—Applicability to petitions under O. 9—Application to restore suit—Dismissal for default—Petition to set aside dismissal—If lies.*

Venkatanarasimha Rao *v.* Suryanarayana.

A suit having been dismissed for default, an application to restore the suit was put in. This application was also dismissed for default and then a petition was put in to set aside the latter dismissal. *Held*, by virtue of S. 141,

*C. R P No. 1014 of 1924. 24th August, 1925.

2. (1898) I L R 21 All 155.

Venkata-narasimha Rao v. Surya-narayana.

O. 9 applies to applications put in under O. 9 itself and the Court has jurisdiction to restore the application. An application under O. 9 is not a petition in a suit, but is an original matter in the nature of a suit covered by S. 141 of the Code.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Avanigadda at Masulipatam in M. P. No. 1271 of 1923 in I. A. No. 2641 of 1922 in O. S. No. 825 of 1921.

*P. Satyanarayana* for petitioner.

*P. Somasundaram* for respondent.

The Court delivered the following

JUDGMENT :—The only question that arises here is whether O. 9 applies only to suits or whether, by reason of S. 141, it also applies to applications made under O. 9 itself. In this case an application to restore a suit was dismissed for default and a subsequent petition was filed to set aside that dismissal. The subsequent petition has been allowed and the original petition under O. 9 is now under enquiry.

The contention for the appellant is that the Court had no jurisdiction to treat the second application as one to which O. 9 is applicable. In *Thakur Prasad* v. *Fakir Ullah* (1) it was laid down by the Privy Council that S. 647 of the Code of 1882, which is equivalent to S. 141 of the present Code, included original matters in the nature of suits, such as proceedings in Probate, Guardianship, and so forth, and did not include executions. The question at issue in that suit was whether execution petitions were included in that section and it was definitely laid down that they were not so included. What was held to be included were original matters in the nature of suits, but this statement is not exhaustive. It is argued that an application under O. 9 is not an original matter in the nature of a suit. It certainly is not a petition in a suit, for the suit is no longer on the file. It relates to a question quite independent of the suit and one which has to be determined on evidence as to matters which would be quite irrelevant to the suit. In this sense it seems to me to come within the meaning of the Privy Council's observations that S. 647 includes original matters in the nature of suits. This view has been taken by the Calcutta High Court in *Bepin Behari Shaha* v. *Abdul Barik* (2), by the Lahore High Court in *Abdul Rahman Shah* v. *Shahanna* (3) and by the Bombay High Court in *Lallubhai Vajeram* v. *Bai Magangavari* (4). There is one authority to the contrary, *i. e.*,

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1. (1894) I L R 17 All 106 : 5 M L J 3 (P C). 2. (1916) I L R 44 Cal 950.
3. (1919) I L R 1 Lah. 339. 4. (1893) I L R 18 Bom. 59.

Venkata-narasimha Rao v. Surya-narayana.

*Ramgulam Singh* v. *Sheo Deonarain Singh* (5) which purports to follow a Full Bench of that Court reported at p. 133 of the same volume, but that Full Bench ruling in effect only repeated the decision of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (1) where the question for determination was whether an execution petition would come under O. 9. The Division Bench which purported to follow the Full Bench ruling have not discussed the question at length but merely purport to follow the Full Bench, with all respect, hardly covered the point in issue. With all respect I agree with the rulings I have mentioned above and hold that the Court had jurisdiction to entertain this petition.

The revision petition must therefore be dismissed with costs.

T. S. V. *Petition dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Dewan Bahadur G. Krishnamachariar ...*Petitioner** (*Plff.*)

*v.*

The Municipal Council, Srirangam, represented by its present Chairman, K. Singam Aiyangar ... *Respondent* (*Defendant*).

Dewan Bahadur G. Krishna-machariar v. The Municipal Council, Srirangam.

*District Municipalities Act, S. 3, cl. (25), S. 95—Residence—Meaning—Person residing at house within Municipal limits for some days in half-year—Liability to pay professional tax—Residence for 60 days if necessary—Suit for recovery of professional tax paid—Maintainability—S. 354 (2), Sch. IV, cl. 28—Effect.*

The plaintiff, a resident of Hyderabad, had a house within the Municipal limits of Srirangam where he came and spent a portion of his vacation. He was called upon to pay professional tax for carrying on money-lending business at Srirangam and paid the same under protest.

In a suit brought by the plaintiff to recover back the professional tax collected from him, it appeared that he did come and reside at his house at Srirangam for some days in the half-year for which the tax was collected. It was contended for him that, as he did not reside within the Municipal limits of Srirangam for 60 days in that half-year, he was not liable to be assessed.

*Held,* that, as the plaintiff did come and reside at his house at Srirangam for some days in the half-year in question, he was a person liable to be assessed, in case he came under S. 95 of the District Municipalities Act.

The plaintiff must be deemed to have resided within the limits of the Srirangam Municipality within the meaning of S. 3 (25) of the Act.

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*C. R. P. No. 740 of 1923. 19th August, 1925.

1. (1894) I L R 17 All 106 : 5 M L J 3 (P C). 5. (1919) 4 Pat L J 287.

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*Held,* further that assuming that he ought to have resided for 60 days in the half-year for which he was assessed, S. 354 (2) of the Act read with cl. 28 of Sch. IV barred the suit.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree in S. C. S. No. 5450 of 1922 on the file of the Court of Small Causes of Trichinopoly.

*K. R. Rangaswami Aiyangar* for petitioner.

*N. Rajagopalachariar* for respondents.

The Court delivered the following

JUDGMENT :—Petition by the plaintiff in S. C. S. No. 5450 of 1922 on the file of the Court of Small Causes, Trichinopoly, to revise the decree, dated 16th April, 1923.

The suit was to recover back professional tax collected from the plaintiff. The plaintiff is a resident of Hyderabad and has a house within the municipal limits of Srirangam where he comes and spends a portion of his vacation. He was called upon to pay professional tax for carrying on money-lending business at Srirangam and paid a sum of Rs. 50 under protest. It was urged before me that as he did not reside within the municipal limits of Srirangam for 60 days in the half-year for which the tax was collected, he was not liable to be assessed. It was conceded that during the half-year for which the tax was levied the plaintiff did come and reside at his house at Srirangam for some days. Such being the case he was a person liable to be assessed, in case he came under S. 95 of the District Municipalities Act. The term "residence" is defined in S. 3, cl. 25 of the Act, and the plaintiff must therefore be deemed to reside within the limits of the Srirangam Municipality. Now assuming for a moment that he ought to have resided for 60 days in the half-year for which he was assessed; S. 354 (2) of the Act read with cl. 28 of Sch. IV, bars the suit. The case appears to me to be on all fours with the case of *Municipal Council of Nellore* v. *Rangayya* (1) which was followed in *Municipal Chairman, Virudupatti* v. *Saravana Pillai* (2). There a house which was completed only on 15th August, 1893, was assessed on 11th September, 1893, and tax collected for the half-year ending 30th September, 1893. It was held that although the building was not in a habitable state for 60 days in the half-year, it should not be said that there was any illegal levy, and that the remedy lay only by way of appeal to the Municipal Council. I dismiss the petition with costs.

A. S. V. *Petition dismissed.*

1. (1895) I L R 19 Mad 10. 2. (1919) 10 L W 592.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Alagirisami Pillai ... *Appellant** (*Petitioner*)

*v.*

Lakshmanan Chetty *alias* Samuel Chetty and another ... *Respondents* (*Decree-holder and Judgment-debtor*).

Alagirisami Pillai *v.* Lakshmanan Chetty.

*Civil Procedure Code, O. 21, Rr. 46, 15, 16; Ss. 146, 151—Debt—Attachment in execution of—Decree obtained on debt by judgment-debtor—Attaching creditor's right to execute decree—No attachment of decree itself—Effect—Payment of debt to judgment-debtor or order of Court recording satisfaction thereof—Effect on attaching creditor's right—S. 60, O. 38, R. 6—Money payable under partition-deed—Right in—Vested or contingent—Attachment of, in execution.*

Under a deed of partition dated 9th February, 1918, between *L* and his co-parceners, a sum of money fell to the share of *L*. The deed recited that the sum fell to *L's* share but was to be retained by his brother *R*, who was bound to pay it over to the former. *R* could not in the meantime alienate his property and was enjoined to pay *L* interest at a rate fixed.

The appellant filed a suit for money (O. S. No. 495 of 1919) against *L* and attached before judgment the debt due to him under the partition-deed. On 3rd July, 1919, the appellant obtained a decree in his suit. Some time after this *L* filed a suit against *R* (O. S. No. 772 of 1920) for recovery of the money due to him under the partition-deed and obtained a decree on 2nd February, 1921. Within a month of that decree *L* and *R* entered into a settlement and *L* reported satisfaction which was recorded on 2nd March, 1921.

On 27th July, 1921, the appellant applied for permission to execute under O. 21, R. 16 of Civil Procedure Code *L's* decree against *R* in O. S. No. 772 of 1920. That petition was dismissed by the Court below, and the appeal was against the order dismissing the petition.

*Per Venkatasubba Rao, J.*:—The appellant who attached the debt but who failed to attach the decree in O. S. No. 772 of 1920 could nevertheless execute it as if he had attached that decree also. The attachment placed on the debt fastened itself on the decree without any further act on the part of the attaching creditor. The debt matured into and merged in the decree and the attachment got naturally transferred from the debt to the decree.

*Quaere* : Whether, if the appellant relied as a source of his title upon the attachment of the decree, he could ignore a payment made prior to that attachment.

*Per Reilly, J.* :—The attachment of the debt did not grow or ripen into on become converted into the right to execute the decree obtained on the debt. It was necessary for the appellant to attach the decree on the debt. His petition to execute the decree ought not to have been dismissed, and he ought to have been allowed to amend it by adding a prayer for the attachment of the decree in O. S. No. 772 of 1920.

*Per Venkatasubba Rao and Reilly, JJ.* :—*L's* interest in the sum retained by *R* was a vested interest and not a contingent interest and it was attachable un-

*A. A. A. O. No. 108 of 1923. 30th July, 1925.

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der S. 60 and O. 38, R. 6, Civil Procedure Code. Neither the alleged payment of the debt by *R* nor the order of the Court recording satisfaction was an obstacle in the way of the appellant executing the decree.

Previous to the suit by *L* against *R* (O. S. No. 772 of 1920) for the recovery of the corpus of the debt attached, *L* had instituted against him a suit for the interest on the debt (O. S. No. 231 of 1919). That suit (231 of 1919) was decreed on 16th December, 1919. The appellant attached that decree and realised on 27th July, 1920, about a tenth of the amount due to him. On a contention being raised that the realisation of that portion extinguished the appellant's attachment before judgment of the whole debt, *held* that the rights of the appellant under the original attachment of the debt did not thereby become exhausted and that the appellant did not thereby render himself incapable to pursue his further remedies.

*Per Venkatasubba Rao, J.*:—If the gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 33 of 1922 preferred against the order of the Court of the District Munsif of Dindigul in E. P. No. 673 of 1922 in O. S. No. 772 of 1920.

*B. Sitarama Rao* and *L. V. Krishnaswami Aiyar* for appellant.

*K. Rajah Aiyar* for respondent.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS:—*Venkatasubba Rao, J*:—Before dealing with the questions of law raised, I shall briefly set forth the facts.

Lakshmanan Chetty entered into a partition with his coparceners under the deed of division dated 9th February, 1918. A sum of money fell to his share and this sum was retained under the terms of that deed with his brother Ramalinga Chetty. The appellant filed a suit for money (O. S. No 495 of 1919) against Lakshmanan and attached before judgment the debt due to him under the partition deed. The appellant on 3rd July, 1919, obtained a decree in his suit. Lakshmanan some time after this filed a suit against Ramalinga (O. S. No. 772 of 1920) for recovery of the money due to him under the partition deed and obtained a decree. Lakshmanan and Ramalinga within a month of this decree entered into a settlement and Lakshmanan reported satisfaction which was recorded.

The decree was obtained by Lakshmanan in O. S. No. 772 of 1920 on the 2nd February, 1921, satisfaction was entered on 2nd March, 1921 and the appellant on 27th July, 1921, applied to execute the decree in O. S. No. 772 of 1920.

The first question that has to be determined is, can the appellant who has attached the debt but who has failed to

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attach this decree execute it as if he has attached the decree also ?

The attachment of a debt is effected under O. 21, R. 46, Civil Procedure Code. It is made by a written order prohibiting the creditor from recovering the debt and the debtor from paying it. It is conceded that the attachment was in force on the date Ramalinga alleges he satisfied the decree by payment to Lakshmana. Ramalinga in making the payment acted in contravention of the prohibitory order and Lakshmana in receiving the debt was equally guilty of disobedience of that order.

Under S. 64, Civil Procedure Code, any payment to the judgment-debtor contrary to the attachment is void as against all claims enforceable under the attachment. For the appellant Mr. B. Sitarama Rao, his learned Vakil, contends that if it was incumbent upon him to follow up the attachment of the debt by attaching the decree Ramalinga could successfully plead that his payment was not void against the attachment of the decree. In other words, if the appellant could trace his rights to the attachment of the debt, the payment relied on by Ramalinga subsequent to that attachment would be void against it ; but if the source of the appellant's title should be held to be attachment of the decree, Ramalinga could successfully rely upon the payment made prior to that attachment. To bring out the point of Mr. Sitarama Rao's contention I shall take an illustration. *A* attaches a debt due from *C* to *B*. Then *B* sues *C* and obtains a decree. On the same day as judgment is obtained *C* pays up the amount to *B*. If the right rule is that the decree must be attached *A* may be easily defeated, for even more than ordinary diligence on his part will not prevent *B* from receiving and *C* from paying the sum decreed.

The Civil Procedure Code does not contain a provision to the effect that the payment shall be void not only as against the later attachment of the decree but also as against the prior attachment of the debt. To this extent there is a lacuna in the Code. But by a distinct provision the creditor is prohibited from paying the debt attached. In the circumstances, what is the reasonable view to take ? I am prepared to hold that the attachment placed on the debt fastens itself on the decree without any further act on the part of the attaching creditor. The debt matures into and merges in the decree and the attachment gets naturally transferred from the debt to the decree. Consistent with the policy and the provisions of the Code this in

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my opinion is the only reasonable view to take. It has been held by the Judicial Committee in *Beti Maharani* v. *The Collector of Etawah* (1) that when a debt is attached a suit for its recovery is not stayed. The order of attachment is infringed only if the restrained creditor pays the debt to the restrained debtor and it is pointed out that very often it may be desirable to institute a suit. Can the attaching creditor's rights be then defeated by the debtor converting the simple debt into a decree debt and receiving payment ? The common sense of the thing demands that this cannot be countenanced.

The appellant's learned Vakil relies upon S. 146, Civil Procedure Code, which runs thus :—

> "Save as otherwise provided by this Code or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Lakshmana could apply to execute the decree. The appellant as one claiming under him could likewise execute it. This contention seems to me to be perfectly sound. The respondents' learned Vakil urges that O. 21, R. 16 governs the case of a transferred decree-holder, that that provision is complete and self-contained and S. 146 cannot be invoked. I cannot accept this argument. Is there anything in O. 21, R. 16 prohibiting persons other than those mentioned in it from being treated as transferee decree-holders ? It is only in that case that S. 146 will not apply by reason of the words "save as otherwise provided by this Code." To place a narrow construction on S. 146 will be to defeat the very object of that section. In the very nature of things, it is impossible to provide by express provision for every conceivable set of facts that may arise. It is just to meet this contingency that Ss. 146 and 151 have been enacted. I am against whittling down the scope of S. 146 by placing a too limited and narrow construction upon it. It must receive its full effect and I think the appellant can invoke it in the present instance.

The view I have taken receives strong support from *Muthia Chetty* v. *Lodd Govindoss Krishnadoss* (2). The point that had to be decided was, could a transferee of a part of the decree execute it ? It was contended that he could not and for that position reliance was placed on O. 21, Rr. 15 and 16. The contention advanced may be put thus :—R. 15 refers to a case of a decree passed jointly in favour of two or

1. (1894) I L R 17 A 198 at 210 (P C).
2. (1921) I L R 44 M 919 : 41 M L J 315 (F B).

more persons. In that case, application for execution of the whole decree may be made by one or more of the joint decree-holders. Next R. 16 provides for the transfer (1) of an entire decree, and (2) of the interest of a decree-holder in a decree passed jointly in favour of two or more persons. It was argued that the transfer by a decree-holder of a part of a decree does not fall either under R. 15 or R. 16 and the transferee in that case could not therefore execute the decree. It need hardly be observed that this was a most unjust contention, the Full Bench holding that S. 146 was applicable rejected the argument. Wallis, C. J., observes that the section should receive a beneficial interpretation and as execution by a transferee of a part of a decree is not prohibited by O. 21, R. 16, there is nothing to prevent S. 146 from receiving its full effect. With the observation of Kumaraswami Sastri, J., that the Courts ought not to refuse relief on the ground that the legislature has not made provision for a particular case, I entirely agree.

I do not think it necessary to refer in detail to the cases cited for the respondent where the scope of S. 146 was restricted. *Mathurapore Zemindari Co.* v. *Bhasaram Mondal* (3) may be taken as representing a class of cases. But this may be easily distinguished as what was assigned was property in the suit previous to the decree. In *Shib Charan* v. *Ram Chandar* (4), which may also serve as a type, there was a transfer of the property subsequent to the decree and it was held that the transferee could not invoke S. 146. This case also is distinguished from the present. But I must dissent very respectfully from the observations made in it in regard to the effect to be given to S. 146. It will be moreover apparent that in the various cases relied on by the respondent (of which these two are typical) the transferee could have safeguarded his position by taking appropriate proceedings under the provisions of the Code. But in the present instance, this element is wanting and in my opinion this makes a very great difference.

I therefore hold that the appellant can rely upon S. 146. Two minor contentions I may now dispose of. First, it is argued that as Lakshmana who certified that the decree was satisfied could not execute it, the appellant could have no higher rights under S. 146. This argument is based upon a misapprehension. The appellant claims under Lakshmana in

3. (1924) I L R 51 C 703. 4. A I R 1922 All 98.

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the sense that he acquired Lakshmana's rights as on the date of the decree. As I have remarked, the simple debt became merged in the decree debt and the moment the decree was passed the attachment of the debt became automatically converted into attachment of the decree, and any dealing by Lakshmana will not in consequence be of any avail.

The other contention has reference to certain facts which I have not so far mentioned. Lakshmana, previous to filing the suit (No. 772 of 1920) against Ramalinga for the recovery of the corpus, had instituted against him a suit for the interest on the debt. This suit was O. S. No. 231 of 1919 and was decreed on 16th December, 1919. The appellant attached this decree and realised on 27th July, 1920 about a tenth of the amount due to him. It is urged that the rights under the original attachment of the debt became thus exhausted and the appellant rendered himself incapable to pursue further remedies. This argument is untenable as what was attached was the entire debt and the recovery of a portion cannot bar the recovery of the balance.

Then remains one of the main contentions raised, namely, that the attachment is void as Lakshmana had only a contingent interest in the sum attached and S. 60, sub-clause (*m*), Civil Procedure Code, declares such an interest not liable to attachment. Whether Lakshmana took a vested or a contingent interest is a question of intention and on a construction of the partition deed I find no difficulty in holding that his interest was vested. It recites that the sum fell to Lakshmana's share but is to be retained by Ramalinga who is bound to pay it over to the former at his marriage. Ramalinga cannot in the meantime alienate his property and is enjoined to pay Lakshmana interest at a rate fixed.

It is a well-known rule of construction that if the gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting. The question is are there words constituting a gift independent of the direction to pay? If there are, the interest is a vested interest. In the deed in question, there is a present gift with a postponed payment and a vested interest is thus created. Batholomew's Trusts (1 Mac & C 354 Re Hart's Trusts 3 De G & J 195 at 202 ; Hawkins' Wills, 2nd Edn., 1912, p. 270 at 272). A stipulation that interest shall be given in the meantime shows that a present gift was intended. A bequest to *A* to be paid on his marriage with a clause that interest shall be paid

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till then, is vested. [*Vize* v. *Stoney* (5)]. The result is that the last contention also fails.

My learned brother thinks that the attachment of the debt cannot become automatically transferred into an attachment of the decree. Although we take different views on this point our conclusions do not materially differ. According to my view, attachment of the decree in the circumstances is not essential; according to my learned brother's view, this attachment cannot be dispensed with, but neither the alleged payment by Ramalinga nor the order of the Court recording satisfaction is an obstacle in the way of the appellant executing the decree. On the point, namely, whether the appellant, if he relies as a source of his title upon the attachment of the decree, can ignore a payment made prior to that attachment, I would prefer to express no opinion at present. Although we give different reasons for our conclusions, we are agreed that the appellant has not lost his remedy and that he is not bound by the alleged payment or the recording of satisfaction. I have therefore no objection to the appellant being directed to amend his execution petition by asking for attachment of the decree and I accordingly agree to the order being in the terms suggested in my learned brother's judgment.

Reilly, J.

*Reilly, J.* :—I agree that Lakshmanan Chetti's interest in the Rs. 1,233, to which he was entitled under the partition-deed, Ex. III, was a vested interest and not a contingent interest and it was attachable under S. 60, Civil Procedure Code, and R. 6 of O. 38, Civil Procedure Code, on 17th June, 1919, as a debt due to him, though on that date he could not enforce payment of it. But with great respect I find myself unable to agree that the appellant was entitled on the strength of his attachment before judgment to execute the decree for that amount which Lakshmanan Chetti afterwards obtained in O. S. No. 772 of 1920 on the District Munsif's file without attaching that decree.

My view of the position in this case is as follows :—The appellant instituted O. S. No. 495 of 1919 on the District Munsif's file, a suit for money, against Lakshmanan Chetti (Respondent 1) and on 17th June, 1919, obtained in that suit an attachment before judgment of the debt due to Lakshmanan Chetti from his brother, Ramalinga Chetti (Respondent 2) under Ex. III. The attachment order is not before us; but it is admitted that it was in the usual form, prohibiting Laksh-

5. 1 D & War 337.

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manan Chetti from recovering the Rs. 1,233 or the interest on it and Ramalinga Chetti from paying that amount or the interest on it until the further order of the Court. On 3rd January, 1920, the appellant obtained a decree in his suit against Lakshmanan Chetti for Rs. 624. It is not disputed that the attachment order prohibiting Lakshmanan Chetti and Ramalinga Chetti from recovering and paying the debt respectively was not affected by that decree but remained in full force after the making of that decree. Meanwhile Lakshmanan Chetti, who had filed O. S. No. 231 of 1919 against Ramalinga Chetti for the whole debt due to him under Ex. III, had, on 16th December, 1919, obtained a decree in that suit only for the interest on the principal amount, his claim for the principal amount being dismissed as premature on the ground that he had not then been married and therefore had not fulfilled the condition on which the principal was to become payable. The appellant's attachment before judgment did not prevent Lakshmanan Chetti from prosecuting that suit to a decree ; but it did prohibit him from recovering any amount under his decree. The appellant then attached in execution of his own decree the decree for interest which Lakshmanan Chetti had obtained in O. S. No. 231 of 1919, executed the latter decree under R. 53 of O. 21, Civil Procedure Code, and realised the amount due under it, Rs. 68-4-0, from Ramalinga Chetti. It has been suggested before us for Ramalinga Chetti that the execution of this decree of Lakshmanan Chetti against him for the interest so far due on the Rs. 1,233 somehow extinguished the appellant's attachment before judgment of the whole debt. I agree that that could not be so and that the order prohibiting Lakshmanan Chetti from recovering and Ramalinga Chetti from paying the debt persisted after the execution by the appellant of Lakshmanan Chetti's decree in O. S. No. 231 of 1919. Later on Lakshmanan Chetti fulfilled the condition of marriage and instituted another suit, O. S. No. 772 of 1920 on the District Munsif's file, against Ramalinga Chetti for the principal amount of Rs. 1,233 and the interest on it not so far recovered. That he was entitled to do in spite of the appellant's attachment before judgment ; and he obtained a decree for the whole amount claimed and costs on 2nd February, 1921. That decree the appellant could have attached and executed under R. 53 of O. 21, as he had already attached and executed the decree in Lakshmanan Chetti's previous suit, O. S. No. 231 of 1919. But before

he bestirred himself to do so, Lakshmanan Chetti, on 22nd February, 1921, took out an arrest warrant against Ramalinga Chetti, who appears to have been arrested under it. On 2nd March, 1921, Lakshmanan Chetti reported to the Court that Ramalinga Chetti had paid the full amount of the decree to him, and the District Munsif recorded full satisfaction. On 27th July, 1921, the appellant applied for permission to execute under R. 16 of O. 21, Civil Procedure Code, Lakshmanan Chetti's decree against Ramalinga Chetti in O. S. No. 772 of 1920. That is the petition against the dismissal of which, after confirmation of the dismissal by the Subordinate Judge, the present appeal is preferred.

The appellant claimed to execute the decree under R. 16 of O. 21. He did not attach Lakshmanan Chetti's decree under R. 53 of O. 21, and in explanation of his failure to do so it is suggested that he could not do so because the recording of satisfaction on 2nd March, 1921, stood in his way. I may remark that, if the recording of satisfaction stood in the way of his attaching the decree in July, 1921, it equally stood in the way of the appellant executing the decree as a transferee under R. 16 of O. 21. But I cannot see that the recording of satisfaction was a bar to execution of the decree by the appellant. There is nothing sacrosanct about the recording of satisfaction. As between Lakshmanan Chetti and Ramalinga Chetti the admission of Lakshmanan Chetti that he has received the full amount of the decree may be conclusive. So far as the purposes of the Court are concerned, the recording of satisfaction is a mere matter of office business, a note that those proceedings are closed. In my opinion it cannot be supposed for a moment that by settling the decree between themselves and getting the Court to record satisfaction as between them Lakshmanan Chetti and Ramalinga Chetti were able to defeat the rights of third parties, still less that they were able by so doing to evade the prohibitory order against them, which was still in force. To allow them so to defeat the order obtained by the appellant would be to allow a clear abuse of the process of the Court and a clear fraud upon the Court. It is not disputed that the District Munsif recorded satisfaction in ignorance of the appellant's attachment before judgment, which was not brought to his notice. Even between the parties to a decree an order recording satisfaction which has been obtained by fraud may be vacated. [See *Paranjpe* v.

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*Kanade* (6) and *Vilakathala Raman* v. *Vayalil Pachu* (7)]. As stated in *Syed Tuffuzzool Husain Khan* v. *Raghunath Pershad* (8), which was quoted before us for another purpose, "to proceed so far as the practice of his Court will allow him to recall and cancel an invalid order is not simply permitted to, but is the duty of, a Judge who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor." That principle is now clearly recognised in S. 151, Civil Procedure Code. In my opinion, had the appellant in July, 1921, applied for the attachment of Lakshmanan Chetti's decree in O. S. No. 772 of 1920 and had Ramalinga Chetti then objected that he had already satisfied the decree by payment to Lakshmanan Chetti, the answer would have been that that payment made in defiance of the prohibitory order obtained by the appellant and still in force, could affect the appellant in no way; and, if it had been further objected that the formal order of the District Munsif made on 2nd March, 1921, recording satisfaction of the decree stood in the appellant's way—an objection which personally I see very little force—it would obviously have been within the District Munsif's power under S. 151, Civil Procedure Code, to cancel that order. In my view the proper course for the appellant in July, 1921, was to attach the decree in O. S. No. 772 of 1920 under R. 53 of O. 21 and proceed to execute it against Ramalinga Chetti, who could have raised no effective bar to his doing so. Section 64, Civil Procedure Code, would not perhaps have been applicable, as the appellant would not have been enforcing his decree under his original attachment before judgment but under his attachment of the decree itself. But, as the satisfaction of the decree by Ramalinga Chetti could not have been pleaded successfully against the appellant, the road to the execution of the decree by the ordinary procedure of attaching it would have been open to him.

It has been contended before us that it was unnecessary for the appellant to attach Lakshmanan Chetti's decree on the debt in O. S. No. 772 of 1920 because on the making of that decree the appellant's original attachment of the debt in some way developed into an attachment of the decree. With respect, I am unable to accept the contention. Attachments in execution or before judgment are in their nature merely means of getting the property concerned into the control of the Court

6. (1882) I L R 6 Bom 148. 7. (1914) 27 M L J 172.
8. (1871) 14 M I A 40.

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and of restraining the party against whom they are directed from transferring, delivering, changing or destroying the property. By special provisions in R. 53 of O. 21 an attachment in execution of any of certain special classes of decrees—not all decrees—carries with it a special privilege, namely, the right to execute the decree attached. This is a peculiar privilege, in itself quite foreign to the idea of attachment and given only by special provisions. Unless those special provisions are complied with, I do not understand how that special privilege can be acquired. In the present case what the appellant got when the debt was attached at his instance was an order prohibiting Lakshmanan Chetti from recovering it and Ramalinga Chetti from paying it. He acquired by that order no right to sue on the debt or to collect it or to give a valid discharge of it. How can the prohibitory order which he obtained grow or ripen into or be converted into something quite different, namely, the right to execute a decree obtained on the debt? It appears to me that that is impossible without some provision of law to that effect. The special privilege of executing Lakshmanan Chetti's decree, it is something quite different in nature and effect from the prohibitory order, was, in my view, open to the appellant only if he took, as he could have taken, the special step necessary for obtaining that privilege, namely, the attachment of the decree. Incidentally I may point out as a minor difficulty in the theory that the attachment of the debt automatically develops into the attachment of any decree in that debt, that the decree in most cases include an amount for costs to which the attachment of the debt itself cannot apply. In the present case the costs awarded to Lakshmanan Chetti by the decree in O. S. No. 772 of 1920 were considerable.

I do not think it necessary to consider in this case the question whether the appellant should be regarded as "claiming under" Lakshmanan Chetti in any sense within the meaning of S. 146, Civil Procedure Code. As the case appears to me, the appellant might have proceeded under the definite provisions of R. 53 of O. 21, and it therefore is unnecessary—and indeed impossible—for him to call in aid for his present purpose the provisions of S. 146. Similarly the appellant is, in my view, mistaken in attempting to represent that he is in any sense a transferee of Lakshmanan Chetti's decree under R. 16 of O. 21 instead of claiming his right to attach that decree and then execute it. If I may say so, the appellant in

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attempting to make use of S. 146 and R. 16 of O. 21 in this case appears to be taking a very circuitous route to get round an obstacle which does not really lie in his path or which at the worst would crumble at a touch, namely, the District Munsif's order recording satisfaction.

I do not think that the appellant's petition under appeal should have been dismissed. The proper course would have been to allow him to amend it by adding a prayer for the attachment of the decree in O. S. No. 772 of 1920. I agree that the present appeal should be allowed with costs, that the dismissal of the appellant's execution petition should be set aside and that the petition should be remanded to the District Munsif for fresh disposal ; but I would add a direction that the District Munsif should allow the appellant to add a prayer for the attachment of Lakshmanan Chetti's decree in O. S. No. 772 of 1920.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Muthuvenkatarama Reddiar and two others ... *Appellants** (*Petitioners*)

*v.*

The Official Receiver of South Arcot and two others ... *Respondents* (*Official Receiver and Respondents Nos.* 50 *and* 51).

Muthuvenkatarama Reddiar v. The Official Receiver of South Arcot.

*Provincial Insolvency Act, S.* 28, *cl.* (5)—*Civil Procedure Code, S.* 60, *cl.* (*c*) —*Agriculturist—Houses and other buildings belonging to an agriculturist—Meaning—Large landed proprietor whose sole income is from land if an agriculturist—House and cattle-shed belonging to him if exempt under S.* 60, *cl.* (*c*).

Under S. 28, cl. 5 of the Provincial Insolvency Act, all properties which are exempt by reason of S. 60 of the Civil Procedure Code, or by any other law from liability to attachment and sale in execution of a decree do not vest in the Official Receiver and are therefore not liable to be sold to satisfy the claims of the creditors.

The appellants were adjudicated insolvents on their own petition in 1922. They applied to the District Court on 24th July, 1924, for a declaration that two items of property, a terraced house and a cattle-shed, did not vest in the Official Receiver, their contention being that they were agriculturists and that the two items which were buildings which they occupied were exempt from the operation of the Insolvency Law by reason of S. 28, cl. 5 of the Provincial Insolvency Act.

The appellants were large landed proprietors owning about 300 acres of land worth nearly a lakh and their debts amounted to Rs. 1,35,000 and odd. The two items were valued by the appellants themselves at Rs. 6,000 and Rs. 1,000 respectively.

*A A O No. 1 of 1925. 24th September, 1925.

*Held*, that the appellants were not entitled to plead exemption under S. 60, cl. (*c*) of Civil Procedure Code.

*Per Devadoss, J.* :—A large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of S. 60, cl. (*c*) of Civil Procedure Code. The protection given by that clause is given to small owners of land as well as actual tillers of the soil. The word "agriculturist" must be interpreted in a strict sense. The appellants are not agriculturists within the meaning of the clause. Further, in order to make out that the house and cattle-shed come within the meaning of the clause, the appellants must show that they have been occupied for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate land.

*Per Waller, J.*:—The appellants' land having vested in the Official Receiver, and there being nothing to show that they cultivate any other land as labourers or tenants, they cannot any longer be described as agriculturists. A house, to be exempt from attachment under S. 60, Civil Procedure Code, must belong to or be occupied by an agriculturist as such, *i. e*., for the purpose of agriculture.

Appeal against the order of the District Court of South Arcot at Cuddalore, dated the 17th November, 1924, in I. A. No. 399 of 1924 in I. P. No. 14 of 1922.

*S. T. Srinivasagopalachari* for appellants.

*C. Padmanabha Aiyangar* and *T. D. Srinivasachari* for respondents.

The Court delivered the following

JUDGMENTS :—*Devadoss, J.* :—The appellants were adjudicated insolvents on their own petition in 1922. They applied to the District Court on 24th July, 1924, for a declaration that the two items of property, a terraced house and a cattle-shed, did not vest in the Official Receiver. The District Judge dismissed their petition, and they have preferred this appeal. Devadoss, J.

The contention of the appellants is that they are agriculturists and the two items which are buildings which they occupied are exempt from the operation of the Insolvency Law by reason of S. 28, cl. 5, of the Provincial Insolvency Act. The appellants are large landed proprietors owning about 300 acres of land worth nearly a lakh and their debts amounted to Rs. 1,35,000 and odd. The two items are valued by the appellants themselves at Rs. 6,000 and Rs. 1,000 respectively. Under S. 28, cl. 5 all properties which are exempt by reason of S. 60 of the Code of Civil Procedure or by any other law from liability to attachment and sale in execution of a decree do not vest in the Official Receiver and are therefore not liable to be sold to satisfy the claims of the creditors. The question for determination is whether the two buildings come within S. 60, cl. (*c*) of the Code of Civil Procedure. Clause (*c*) is in these terms :—

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"Houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto) and necessary for their enjoyment belonging to an agriculturist and occupied by him."

In order to claim exemption under S. 60, cl. (*c*), two points should be found in favour of the appellants, (1) the appellants are agriculturists within the meaning of cl. (*c*); and (2) the house and cattle-shed are such as are mentioned in cl. (*c*).

The term 'agriculturist' means etymologically one versed in agriculture and is not used in cl. (*c*) in its etymological sense but it is used to denote a person making his living by tilling the soil, in other words, one whose sole means of livelihood is gained by cultivating land and does not necessarily mean only a person who works with his hands. But it means and includes a small holder of land who tills the soil and cultivates it. Clause (*c*) has to be read in the light of cls. 1 and 2. What is exempt from attachment is what is absolutely necessary to enable a person to live, such as wearing apparel, cooking vessels, bedding, etc., tools of artisans, implements of husbandry, etc. A large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of cl. (*c*). Mr. Srinivasagopalachariar's contention is that a man whose sole income is from land, whatever its extent may be, whether he cultivates the land himself or leases it, is an agriculturist. If this is the correct meaning of the word "agriculturist," a man owning, say, 1,000 acres of wet land is an agriculturist provided he has no other source of income. It could not have been the intention of the Legislature to give protection to such people. The protection is given to small owners of land as well as actual tillers of the soil. The word "agriculturist" must be interpreted in a strict sense. In *Jivan Bhaga* v. *Hira Bhaiji* (1), West, J. observes :—

"It was for agriculturists in the strictest sense and for an agriculturist in that sole character that the protection of S. 266 (*c*) of the Civil Procedure Code was intended."

We hold that the appellants are not agriculturists within the meaning of cl. (*c*) of S. 60.

Even if the contention of the appellants that they are agriculturists is upheld, they would not succeed in the appeal unless they make out that the house and cattle-shed are houses and buildings within the meaning of cl. (*c*). In order to make out that the house and cattle-shed come within the mean-

1. (1887) I L R 12 Bom 363.

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ing of cl. (*c*), they must be shown to have been occupied for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate land. The expression " and occupied by him " gives the clue to the meaning of cl. (*c*), *i. e.*, that they are occupied by the agriculturists as such, such as houses or buildings as are necessary for pursuing the occupation of agriculturists—a shed in a field or a house in the midst of fields which is occupied so that the agricultural occupation may be carried on effectively and without loss of time, or, in other words, without such buildings and houses the agricultural operations would suffer. A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by cl. (*c*), nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land. A man may have a house in a town and a small holding at a considerable distance from the income of which he maintains himself. As the house in the town is not occupied by him for purposes of agriculture, it is not exempt from attachment and sale under cl. 6.

We are glad to find that the view that we hold is in accordance with the view expressed by West and Nanabhai Haridas, JJ., in *Radhakisan Hakumji* v. *Balvant Ramji* (2). The learned Judges observe at page 531 :—

"The exemption is of a house or building occupied by an agriculturist, and this, we think, means a house dwelt in by an agriculturist as such, and the farm buildings appended to such dwelling. It does not include other houses, which in one sense may be occupied ; what is meant is a physical occupation by an owner of his house as a dwelling appropriate or convenient for his calling."

The house and cattle-shed are in the midst of a village containing, it is said, about 300 houses and cannot be said that they were occupied by the appellants for purposes of agriculture and they do not come within the meaning of " houses and other buildings belonging to an agriculturist and occupied by him " within the meaning of S. 60, cl. (*c*) of the Code of Civil Procedure.

The decision in *Devare Hegde* v. *Vaikunt Subaya* (3) does not help the appellants. The learned Judges cite with approval the passage in *Radhakisan Hakumji* v. *Balvant Ramji* (2), extracted above, and hold that if the building came within the exemption given by S. 60, cl. (*c*) at the time of the

2. (1883) I L R 7 Bom 530.   3. (1917) I L R 41 Bom 475.

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Davadoss, J.

attachment, the benefit thereof would not be lost by the death of the judgment-debtor.

That the present contention is an after-thought is clear from the fact that the appellants mention the two items in their schedule as assets available for distribution among the creditors and delivered possession thereof to the Official Receiver two years before they made the application to the Lower Court.

In the result the appeal fails and is dismissed with costs.

Waller, J.

*Waller, J.* :—I do not consider that appellants can any longer be described as agriculturists. Their land has vested in the Official Receiver and there is nothing to show that they cultivate any other land as labourers or tenants. A house, to be exempt from attachment under S. 60 of the Code of Civil Procedure, must belong to or be occupied by an agriculturist as such, *i. e.*, for the purpose of agriculture. Apart from that appellants placed the Official Receiver in possession of goods before the adjudication and I do not think that they should now be allowed to plead exemption. I agree that the appeal should be dismissed with costs.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Rukmani Ammal ... *Petitioner* (Wife of D W. 1 in C. C. No. 108 of 1924 on the file of the Court of the Stationary Second Class Magistrate, Cuddalore)*

*v.*

Muthurama Reddi ... *Respondent.*

Rukmani Ammal v. Muthurama Reddi.

*Penal Code, Ss. 403, 405—Engine—Agricultural engine—Criminal misappropriation of—Offence of—What amounts to—Lessee of engine having dominion over it with consent of real owner—Sale by engine of—If and when amounts to an offence.*

Petitioner borrowed an agricultural engine from P. W. 1, his relation, who was looking after it for the real owner. Petitioner had also a lease of the engine from P. W. 1. Petitioner sold the engine to his aunt, the wife of P. W. 1's brother. The Courts below convicted the petitioner of criminally misappropriating the engine, the breach of trust being alleged to consist in the sale of the engine by the petitioner to his aunt.

The Courts below gave no finding of dishonesty, but merely recorded that the petitioner disposed of the engine "in violation of the trust." There was

*Cr. Rev Case No. 779 of 1924.

Cr. Rev Petitions Nos. 651 of 1924 and 52 of 1925. 6th August, 1925.

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no clear proof of intention to cause wrongful loss to P. W. 1, or to the real owner, or to the vendee. The engine was not moved from the place where P. W. 1 allowed the petitioner to put it, and there was no evidence of an intention to move it either.

*Held,* reversing the Courts below that the petitioner was not guilty of any criminal offence. Obviously something more than breach of trust is necessary to bring the case within the purview of a Criminal Court.

It cannot be laid down as an absolute rule applicable to all cases that if a man cannot move a thing away, he cannot dishonestly convert it to his own use.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Cuddalore in Cr. Appeal No. 66 of 1924 preferred against the judgment of the Court of the Stationary Second Class Magistrate of Cuddalore Taluk in C. C. No. 108 of 1924.

*V. L. Ethiraj* and *M. C. Sridharan* for petitioner.

*The Public Prosecutor* and *E. V. Sundara Reddy* for respondents.

The Court made the following

ORDER :—The petitioner has been fined Rs. 50 (Sub-Magistrate and Sub-divisional Magistrate of Cuddalore in C. C. No. 108 and C. A. No. 66 of 1924) for criminally misappropriating an agricultural engine valued at Rs. 2,000. Admittedly he borrowed this engine under Exhibit A, from his relation Muthurama Reddi, P. W. 1, who says that he was looking after it for the real owner Muthuveera Reddi, P. W. 4. The petitioner says that he also had a lease of the engine from Muthurama Reddi, Ex. II, which the Lower Appellate Court seems prepared to concede, para. 4. The alleged breach of trust was the sale of this engine by petitioner to his aunt, the wife of Muthurama Reddi's brother, D. W. 1. This witness says that the engine is family property. He is disbelieved but unless the Lower Courts accepted some theory of a family quarrel, it is difficult to understand why they inflicted such paltry sentences. The Sub-Magistrate fined the petitioner Rs. 100 which the Sub-divisional Magistrate reduced to fifty. If a man criminally misappropriates property of another worth Rs. 2,000 it is not an extenuating circumstance to plead that he and his victim are closely related; the extenuating circumstance would be that there has been no real misappropriation.

This is the point taken in this petition. Petitioner was given dominion over the property by Muthurama Reddi and it is urged he has not converted it to his own use, or disposed of it by selling it to his aunt, a mere paper

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transaction ; nor has he caused any wrongful loss to its owner Muthuveera Reddi for whom the engine is still available. No one complains that the aunt has suffered wrongful loss.

The question for determination may be pinned to illustration (*b*) of S. 405, Indian Penal Code. If *A* sells the furniture by a deed of sale to *B* but does not remove it, and if *B* makes no complaint, can *Z* complain that there has been criminal breach of trust ?

How far wrongful loss or gain has resulted to *A* or *B* from the sale to *B* is not in question. Therefore it would not be a dishonest sale, unless it could be proved that *A* intended *B* to remove the furniture and so cause loss to *Z*. In the case of furniture it would not be difficult perhaps to prove such dishonesty; but it is more difficult in regard to an engine which no one moved or apparently intended to move from the place where Muthurama Reddi allowed the petitioner to put it.

Suppose that instead of an engine it had been land over which the petitioner had been given dominion and in respect of which he executed a sale deed to a third person, would that be criminal breach of trust as defined by S. 405 ? S. 403 refers in terms to moveable property, and it has been ruled that S. 404 must be read with it as also limited to moveable property. *Reg* v. *Girdhar Dharamdas* (1). In *Jugdown Sinha* v. *Queen-Empress* (2) it has been held that property referred to in S. 405 must as in S. 403 be moveable property and that, as it has been ruled in *Reg* v. *Girdhar Dharamdas* (1), criminal breach of trust cannot be committed in respect of immoveable property. As a matter of fact the Bombay ruling, as I have shown above, makes no reference to criminal breach of trust, and the Calcutta ruling must, I think, be based on the general assumption that if a man cannot move a thing away, he cannot dishonestly convert it to his own use. In the majority of cases that assumption may be correct; but the wording of S. 405 is very comprehensive and I think it is dangerous to lay any absolute rule. For the purpose of this case it is sufficient to find that although the Lower Courts have not said so in so many words, the sentences inflicted show that they regarded the case as essentially civil in character, and moreover there is no clear proof of intention to cause wrongful loss either to Muthurama or to Muthuveera Reddy. In fact, the Lower Appellate Court has given no finding of dishonesty; it merely records that the petitioner disposed of the engine "in violation of the trust." Obviously

1. (1869) 6 B H C R (Cr.) 33. 2. (1895) I L R 23 Cal 372.

something more than breach of trust is necessary to bring the case within the purview of a Criminal Court. For the above reason I set aside the conviction and order the fine to be refunded. No order under S. 517, Code of Criminal Procedure, is necessary in these circumstances and the propriety of that passed by the Sub-divisional Magistrate (which I now cancel) need not be questioned. I would only observe that before passing it he would have been well advised to give notice to the parties concerned.

A. S. V. *Conviction set aside : Fine refunded.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Sree Rajah Vasireddi Sree Chendra Mouleswara Prasada Bahadur Manni Sultan Zamindar Garu (Muktyala Estate) ... *Appellant** (*Plaintiff*)

*v.*

Yadavalli Kameswara Somayajulu and others ... *Respondents* (*Defendants*).



*Madras Estates Land Act, S. 151—Agricultural holding—Impairing of—Value of—What amounts to—Sale of almost whole of land leased for building purposes—Building actually erected by purchaser only over small portion of land purchased—Ejectment of lessee—Liability for—Compensation—Landlord's right to.*

The plaintiff leased 15 acres 65 cents of dry land to the predecessor of defendants 1 to 4 for a period of 30 years for agricultural purposes. Defendants 1 to 4 sold 14 acres out of that land to defendants 5 to 10 for building purposes.

In a suit brought by the plaintiff under S. 151 of the Estates Land Act for the ejectment of defendants 1 to 4 on the ground that they had materially impaired the value of the holding for agricultural purposes, it appeared that only a small extent of the land sold to defendants 5 to 10 had been actually built upon by them.

*Held,* (1) that, by selling practically the whole of the land leased for building purposes, by agreeing to buildings being erected on it, and by precluding themselves from raising any objection thereto, defendants 1 to 4 materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes and that plaintiff was accordingly entitled to a decree for ejectment; and (2) that, as the buildings had not prior to suit been erected over any considerable portion of the holding, plaintiff was not entitled to be paid any compensation.

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*S. A. No. 1867 of 1923. 27th August, 1925.

Sree Rajah Vasireddi Sree Chendra Mouleswara Prasada Bahadur *v.* Kameswara Somayajulu.

Second Appeal against the decree of the District Court of Kistna at Masulipatam, dated 5th March, 1923, in A.S. No. 119 of 1922 preferred against the decree of the Court of the Additional Deputy Collector of Bezwada, dated 31st March, 1922, in Summary Suit No. 439 of 1921.

*C. S. Venkatachari* and *A. Venkatachellam* for appellant.

*Sir K. V. Reddi* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff (appellant) leased 15 acres 65 cents of dry land to the predecessor of defendants 1 to 4 in 1907 for a period of 30 years. Defendants 1 to 4 have now sold 14 acres of land to defendants 5 to 10, and the 5th defendant has begun the erection of a building on 100 sq. yds., has planted about 25 or 30 trees and fenced in one acre of this land and sunk a well. The plaintiff accordingly brings this suit under S. 151 of the Estates Land Act for the ejectment of defendants 1 to 4. The sale deed of the 14 acres is not filed, but the 8th defendant, who is the only defendant examined in the suit, admits that the 14 acres were purchased for about Rs. 1,800 and that the land has been purchased for building purposes, cattle-sheds and storage of hay. Although, therefore, the 5th defendant alone has begun building on the land, it is clear that defendants 5 to 10 have all purchased the land for building purposes and defendants 1 to 4 have executed the sale deed for that purpose. Both the Lower Courts have found that the erection of this building by 5th defendant on two cents of land and the planting of fruit trees and the sinking of the well have not materially impaired the value of the holding for agricultural purposes.

It is contended for the respondent on the authority of *Hari Mohan Misser* v. *Surendra Narayan Singh* (1) that this is a finding of fact which is binding on me in second appeal, but this contention cannot be upheld in the present case, for S. 151 contemplates a suit against the ryot for materially impairing the value of the holding. In this case the ryot is defendants 1 to 4 between whom alone and the plaintiff there is the relation of landlord and tenant. We are not concerned here with the action of 5th defendant, except in so far as it is in pursuance of the act of defendants 1 to 4. The sale to defendants 5 to 10 is not binding on the plaintiff, and

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(1) (1907) I L R 34 Cal. 718 : 17 M L J 361 (P C).

Sree Rajah Vasireddi Sree Chendra Mouleswara Prasada Bahadur *v.* Kameswara Somayajulu.

inasmuch as each of the vendors is only entitled to 2 1|3 acres, the landlord can object to the sub-division of the land, inasmuch as each sub-division is less than 5 acres of dry land. When we come to consider whether the tenants have materially impaired the value of the holding we have to realise what it is that the tenants have done. The land is leased for agricultural purposes and by selling 14 acres out of 15.65 acres for building purposes the tenants have in effect converted the agricultural land into building sites. It is true that at present only a small extent of the land has been actually built upon, but defendants 1 to 4 have agreed to buildings being erected upon the whole 14 acres and have precluded themselves from raising any obstruction thereto. When we therefore consider the holding as an agricultural holding there only remains 1 acre 65 cents of agricultural land. If the ryots wished to cultivate the whole they could not do so because of their contract with defendants 5 to 10 under which the nature of the holding is entirely altered, and in this view it appears to me that they have materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes.

The plaintiff is accordingly entitled to a decree for ejectment.

Plaintiff has also claimed compensation. It cannot be suggested that the erection of this small building has materially injured the plaintiff and it would be very difficult to fix the amount of compensation. It is, however, recognised by Napier, J. in *Sankaralinga Moopanar* v. *Subramania Pillai* (2) that some compensation would be admissible as otherwise ryots will be enabled to convert agricultural land into town plots and take the whole increased value to themselves, but, as in this case, the buildings have not yet been erected over any considerable portion of the holding I do not consider that any compensation need be paid.

The second appeal is allowed and there will be a decree for ejectment with costs throughout.

A. S. V. *Appeal allowed.*

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2. (1915) 29 M L J 514.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Parasurama Mudaliar ... *Petitioner** (*Plaintiff*)

*v.*

Muthuswami Pillai and others .... *Respondents* (*Defendants Nos.* 1 *to* 20).

Parasurama Mudaliar *v.* Muthuswami Pillai.

*Civil Procedure Code, Sch. II, Para.* 1—*Reference to arbitration—Parties interested—Concurrence of—Necessity*—Ex parte *defendant—Concurrence of—If and when necessary—Reference without his concurrence—Decree passed in accordance with award made on—Validity—Revision—Interference in—Vendor—If interested in vendee's suit to establish title to property purchased.*

A defendant who is *ex parte* may be interested in the suit being referred to arbitration, and, if he is interested in the reference, the Court has no jurisdiction to refer the dispute to arbitration without his concurrence, and to pass a decree in accordance with the award of the arbitrators made on such reference.

A vendor, who is impleaded in a suit by his vendee to establish his title to the property purchased, and against whom the vendee will have a claim for damages if such title is not established, is interested in the suit, and is a necessary party to a reference of the suit to arbitration.

If a Court refers a case to arbitration without the consent of the parties interested, it exercises a jurisdiction not vested in it by law, and a decree passed by it in accordance with the award of the arbitrators made on such reference is liable to be set aside in revision.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the District Munsif of Tirukoilur, dated 10th January, 1923, in O. S. No. 37 of 1922.

*K. Bhashyam Aiyangar* for petitioner.

*A. Venkatarayaliah, L. Venkatanarasiah, S. Rajagopala Chariar* and *V. C. Viraraghavachariar* for respondents.

The Court delivered the following

JUDGMENT :—The petitioner seeks to revise the award decreed by the District Munsif, Tirukoilur, in O. S. No. 37 of 1922 on the ground that he was a party interested and never signified his agreement that the matter should be referred to arbitration. It is not disputed that the petitioner never agreed. He was *ex parte* in the suit and only those who put in an appearance signed in token of their consent. Nor can it be said that by remaining *ex parte* he waived his right to be consulted in the matter. There is some conflict of judicial opinion on this point, the Calcutta High Court holding that even though he be *ex parte* the party interested must

*C. R. P. No. 765 of 1923. 18th August, 1925.

be consulted and the Allahabad High Court holding the contrary view. *Girija* v. *Kanai* (1) and *Ajudhia Prasad* v. *Badar-ul-Husain* (2). The ruling case in this Court is *Potita Pavana Panda* v. *Narasinga Panda* (3) to which I defer.

It remains to consider whether the petitioner was a party interested. He was impleaded by plaintiff as one of his vendors. That is to say he had covenanted to convey title to the plaintiff and was interested in the plaintiff's suit to establish that title, for otherwise he might be sued for damages. It cannot be argued that no question of damages could arise because the purchaser knew that there were disputes about the title. The plaintiff has freely admitted before the arbitrators that he knew of this dispute and objected, but was assured that he would be given documents to prove that the property was the vendor's by ancestral right. That in these circumstances the vendee still has a claim against the vendor is laid down in *Vellayappa Rowthen* v. *Bava Rowthen* (4) by a Bench of this Court.

So it may be taken on the facts that in the present suit all the parties interested did not agree that a matter in difference between them should be referred to arbitration.

It was next argued that even in such circumstances this Court should not interfere by way of revision. The case already referred to, *Potita Pavana Panda* v. *Narasinga Panda* (3), is sufficient authority that such interference is justifiable. *Ghulam Khan* v. *Muhammad Hassan* (5) is sometimes quoted as if a Court acting under the second schedule of the Code was entirely immune from revisional proceedings. But if a Judge refers a case to arbitration without the consent of the parties interested, he is exercising a jurisdiction not vested in him by law, and as made clear in this very ruling that is one of the contingencies for which the Judicial Committee contemplates the possibility of revision.

Lastly, it was suggested that the petitioner is colluding with the plaintiff, and only remained *ex parte* in order to upset the award should occasion arise.

There is no evidence of collusion, and if this were the plot, the respondents should have taken care to defeat it by

1. (1917) 27 C L J 339.
2. (1917) I L R 39 All 489.
3. (1919) I L R 42 Mad. 632 : 36 M L J 538.
4. (1915) 29 I C 747.
5. (1901) I L R 29 Cal. 167 (P C).

Parasurama Mudaliar v. Muthuswami Pillai.

discovering at the outset if the petitioner meant to withhold his consent.

Accordingly the petition is allowed and the decree is reversed. The suit must proceed to trial. The costs to be part of the costs of the suit.

A. S. V. *Petition allowed : Decree reversed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Veerasami Mudali ... *Petitioner** (*Plaintiff*)

*v.*

P. R. Venkatachala Mudali and others ... *Respondents* (*Defendants* 1 *to* 5).

Veerasami Mudali v. Venkatachala Mudali.

*Revision—Interference-by High Court in—Practice—Remedy by suit open—Effect—Specific Relief Act, S. 9—Suit under—Right of—Lease of land trespassed upon—Possession held by lessees under—Landlord's right to sue in case of.*

The High Court will not ordinarily interfere in revision in a case in which the aggrieved party has a remedy by way of suit. But if the remedy is clear, the party aggrieved will not necessarily be driven to another suit.

Plaintiffs in suits brought under S. 9 of Specific Relief Act were non-suited on the ground that on the date of the suits, the plaint lands, although trespassed upon by defendants, were leased to others and therefore only their lessees and not the plaintiffs themselves were entitled to sue.

*Held,* that the Court below was right in so holding.

Case-law on the point reviewed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the decree of the Court of the District Munsif of Poonamallee in O. S. No. 475 of 1922.

*K. Rajah Aiyar* and *N. Panchapakesa Aiyar* for petitioner.

*B. Somayya* for respondents.

The Court delivered the following

JUDGMENT :—Plaintiffs in two connected suits Nos. 475 and 476 of 1922 on the file of the Court of the District Munsif of Poonamallee brought under S. 9 of the Specific Relief Act were unsuited on the ground that on the date of the suits, the plaint lands although trespassed upon by defendants were leased to others and therefore only their lessees and not plaintiffs them-

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*C. R. P. No. 923 of 1923. 18th August, 1925.

Veerasami Mudali *v.* Venkatachala Mudali.

selves were entitled to sue. This petition is brought in order to revise that decision.

Plaintiffs have their remedy by way of suit and in such circumstances this Court will not ordinarily interfere by way of revision [*Devata Sri Ramamurthi* v. *Venkata Sitaramachandra Row* (1)]. But if the remedy is clear, the parties will not necessarily be driven to another suit [*Sri Krishnadoss* v. *Chanduk Chand* (2)]. Therefore the question for determination in this case resolves itself into whether there is clear authority supporting or controverting the decision of the District Munsif.

There has been sharp divergence of judicial opinion upon the point as was clearly revealed when it came before a Full Bench of the Allahabad High Court. Blennerhassett, J., could see no reason why a landlord who has put a tenant in possession should not himself sue to eject a trespasser. Edge, C.J., affirmed as prevailing all the world over that when a man creates a tenancy under him which entitles the tenant to the exclusive use of the property the man creating the tenancy cannot have any right to actual possession so long as the tenant is entitled to possession. It was accordingly held with the concurrence of four other Judges that in these circumstances plaintiff might be entitled to a declaratory decree ; that the trespasser could not interfere with his right to receive rent; and a decree to be put into possession of the rents ; but so long as he did not himself possess the right to enjoy physical possession he could not eject the trespasser.. [*Sitaram* v. *Ram Lal* (3)].

Two years later the question came before a Bench of this Court, which assumed it to be an elementary rule that a plaintiff who seeks possession must show that at the date of the suit he was entitled to such relief. [*Ramanadhan Chetty* v. *Pulikutti Servai* (4)].

So far the law on the matter was clear and the next Madras ruling [*Jagannadhachari* v. *Rama Rayar* (5)] hardly affected the previous decisions, for it was held that the landlord must be entitled to possession at the time of suit, and he was so entitled in that case because the lease had terminated immediately after the dispossession of the tenant by a third person and the

1. (1914) M W N 95. 2. (1908) I L R 32 Mad 334 : 19 M L J 307.
3. (1896) I L R 18 All 440 (F B). 4. (1898) I L R 21 Mad 288 : 8 M L J 121.
5. (1904) I L R 28 Mad. 238.

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tenant was no longer interested in the matter. But unfortunately the head-note to this ruling is drafted as if affirming that a landlord can always bring a suit for possession when his tenant has been dispossessed by a third party. For this unqualified statement there might seem at first to be better authority in *Rangaswami Aiyangar* v. *Krishna Goundan* (6) when Sankaran Nair, J. sitting alone does appear to allow a landlord to sue for physical possession of property of which his tenant had been dispossessed. But though that is the effect of the judgment the reasoning proceeds on the assumption that it is only a question of receiving rent, a matter about which, as Sir John Edge showed in *Sitaram* v. *Ram Lal* (3), there is no difficulty. An earlier Madras case is cited [*Innasi Pillai* v. *Sivagnana Desigar* alias *Gnana Sambanda Pandara Sannadhi* (7)] which also is entirely confined to the question of rent, and before concluding Sankaran Nair J. makes it clear that he is not differing from *Ramanadhan Chetty* v. *Pulikutti Servai* (4). It is not an easy judgment to understand but it is no authority for holding that the landlord can sue in these cases.

In *Krishnan Nambudri* v *Secretary of State* (8) Wallis J., and Abdur Rahim, J. re-affirmed *Ramanadhan Chetty* v. *Pulikutti Servai* (4) and its statement of the elementary rule.

Thus it may be said that at this date there was no real difference of opinion and the ruling of the Allahabad Full Bench prevailed.

In *Ambalavana Chetty* v. *Singaravelu Odayar* (9) a plaintiff who had long been out of possession seems to have suggested that if his tenant had been in possession (which was not the fact) there would be no bar of limitation. His plea was rejected on the facts but his hypothesis was fully discussed by Sundara Aiyar, J. who has assembled the various rulings on the point.

His Lordship says that it is held that the landlord, where his tenant is ousted by a trespasser, may sue under S. 9 of the Specific Relief Act in *Rangaswami Aiyangar* v. *Krishna Goundan* (6), *Jagannadhachari* v. *Rama Rayar* (5) and *Innasi Pillai* v. *Sivagnana Desigar* (7). But as shown

3. (1896) I L R 18 All 440 (F B).
4. (1898) I L R 21 Mad 288 : 8 M L J 121. 5. (1904) I L R 28 Mad. 238.
6. (1910) M W N 838.
7. (1894) 5 M L J 95. 8. (1909) 19 M L J 347.
9. (1912) M W N 669.

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above none of these cases is real authority for that broad proposition. He acknowledges that *Ramanadhan Chetty* v. *Pulikutti Servai* (4) and *Krishnan Nambudri* v. *Secretary of State* (8) are against him, but on the whole is inclined to hold that the landlord has a cause of action (p. 155). This opinion, it may be noted, is *obiter* and is not very strongly expressed.

In 1914 it was held in *Somai Ammal* v. *Vellayya Sethurangam* (10), that if a landlord had given a lease to a tenant the landlord might eject a trespasser in order to put his tenant into possession. The tenant in that case "had not been put in possession at all but was anxious to obtain possession." Such a case seems to proceed on the assumption that the landlord has a right to immediate possession in order to fulfil his contract and the elementary rule in *Ramanadhan Chetty* v. *Pulikutti Servai* (4) would not then be infringed. It is not as though only the tenant had the right of immediate possession.

In 1915 in *Tiruvengada Konan* v. *Venkatachala Konan* (11) it was ruled that though a landlord is not entitled to immediate or *khas* possession, he may obtain a decree for the possession of the reversion and for formal possession. This ruling practically follows *Sitaram* v. *Ram Lal* (3). It also questions whether the *obiter dictum* in *Ambalavana Chetty* v. *Singaravelu Odayar* (9) is not too broadly stated.

In 1916 the question came before Oldfield and Phillips, JJ., in *Kathiri Kutti Musaliar* v. *Chek Kutti Musaliar* (12). They held that a landlord could sue to enable himself to fulfil his contract to give or restore possession to his tenant. Of course, if the ruling stopped at the words "to give" it would merely re-affirm *Somai Ammal* v. *Vellayya Sethurangam* (10) but the addition of the words "to restore" opens up the whole question, and in effect this is a ruling contrary to *Ramanadhan Chetty* v. *Pulikutti Servai* (4). Oldfield, J. begins by remarking that the exposition of the law in *Ambalavana Chetty* v. *Singaravelu Odayar* (9) is consistent with the decisions in *Narayanaswami Naidu Garu* v. *Yerramilli Ramakrishnayya* (13) and *Somai Ammal* v. *Vellayya Sethurangam* (10) The former merely states what is more elaborately developed in the latter ruling that a landlord can sue in order to fulfil

3. (1896) I L R 18 All 440 (F B).
4. (1898) I L R 21 Mad 288 : 8 M L J 121.
8. (1909) 19 M L J 347.
9. (1912) M W N 669.
10. (1914) 29 M L J 233.
11. (1915) I L R 39 M 1042: 30 M L J 258.
12. (1916) 5 L W 330.
13. (1910) I L R 33 M 499.

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his contract to put his lessee in possession. Of course, the broader proposition in *Ambalavana Chetty* v. *Singaravelu Odayar* (9) that he can sue whenever his tenant is dispossessed is not inconsistent with these rulings. Then Oldfield, J. finds that these rulings admit exceptions to the general rule ; though it seems that they establish only one exception, if it can indeed be called an exception. The rule is that on the date of the suit the landlord must show that he has a right to be in possession. If he has never put his tenant in possession and has to get possession in order to do so, he has a right to be in possession, and his suit is not in contravention of the rule. But when it is also claimed that after a landlord has put his tenant into possession and that tenant has been dispossessed, the landlord may sue to restore his possession, it is not to set up an exception to the rule, it is to negative the rule altogether. Oldfield, J. proceeds that he cannot follow *Krishnan Nambudri* v. *Secretary of State* (8) in so far as it rules that a landlord cannot give or restore. *Krishnan Nambudri* v. *Secretary of State* (8) is not concerned with the question whether he can give ; but it certainly rules that he cannot restore and in declining to follow this ruling, Oldfield, J. is maintaining the opposite view and overriding *Ramanadhan Chetty* v. *Pulikutti Servai* (4). No doubt his Lordship seeks to distinguish this ruling by finding on the facts that the trespasser colluded with the tenant, and is therefore (*see* concurring judgment of Phillips, J.) only the licensee of the tenant against whom the landlord can have no cause of action during the continuance of the lease. But in *Ramanadhan Chetty* v. *Pulikutti Servai* (4) although it was alleged in the plaint that the tenant and trespasser had colluded, there is no finding to that effect nor any mention of collusion in the body of the judgment. When their Lordships lay down the elementary rule they are not considering collusion.

*Kathiri Kutti Musaliar* v. *Chek Kutti Musaliar* (12) must be taken as contrary to *Ramanadhan Chetty* v. *Pulikutti Servai* (4). In fact Phillips, J. practically states as much in his concluding sentence.

The whole question was then reviewed by Wallis, C. J. in *Mohideen Rowther* v. *Jayarama Aiyar* (14). The principle underlying the rule is fully explained and the three ruling cases—*Ramanadhan Chetty* v. *Pulikutti Servai* (4), *Krishnan*

4. (1898) I L R 21 M 288 : 8 M L J 121.
8. (1909) 19 M L J 347.
9. (1912) M W N 669.
12. (1916) 5 L W 330.
14. (1920) I L R 44 M 937 : 40 M L J 38.

*Nambudri* v. *Secretary of State* (8) and *Sitaram* v. *Ram Lal* (3)—are approved. The acceptance of the *obiter dictum* in *Ambalavana Chetty* v. *Singaravelu Odayar* (9) as authority is deprecated with an expression of regret that *Sitaram* v. *Ram Lal* (3) was not brought to the notice of the learned Judge. The learned Chief Justice even goes so far as to find that the landlord cannot sue in order to fulfil his contract (page 940) differing from the view already expressed by Sadasiva Aiyar, J. in *Somai Ammal* v. *Vellayya Sethurangam* (10), which view Sadasiva Aiyar, J. re-affirms in a dissenting judgment in this case.

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In *Uday Kumar Das* v. *Kalyani Debi* (15) it is held that the view of Sundara Aiyar, J. in *Ambalavana Chetty* v. *Singaravelu Odayar* (9) cannot be justified on principle and is opposed to what is regarded by Lord Alverstone, C. J. as well-established doctrine [*Walter* v. *Yalden* (16)].

I think it clear from the above examination of the authorities that the view of the learned District Munsif is well supported and there is no justification for revision. I consider that the question is concluded by *Sitaram* v. *Ram Lal* (3), *Ramanadhan Chetty* v. *Pulikutti Servai* (4) and *Mohideen Rowther* v. *Jayarama Aiyar* (14). The petition is dismissed with costs.

A. S. V. *Petition dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE REILLY.

Mulkoori Gavariah (dead) and others ... *Appellants* in Appeal No. 81 of 1923 (Plff. and his L. Rs.)*

*v.*

Chenna Sariah, minor, by guardian Butchiraju and others ... *Respondents in do. (Defts.).*

Mulkoori Gavariah v. Chenna Sariah.

*Contract—Sale of goods—Credit entry in buyer's accounts—Goods left with seller—Pledge by latter—Demand by buyer not complied with—Debit entry of equal amount—Suit for accounts—Rights of buyer.*

The plaintiff, who had accounts with the defendants, purchased goods from them of the value of Rs. 13,471. By arrangement credit was given and the goods

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*Appeal Nos. 81 and 82 of 1923. 11th September, 1925.

3. (1896) I L R 18 All 440 (F B). 4. (1898) I L R 21 Mad 388 : 8 M L J 121.
8. (1909) 19 M L J 347. 9. (1912) M W N 669
10. (1914) 29 M L J 233. 14. (1920) I L R 44 M 937 : 40 M L J 38.
15. (1922) I L R 49 C 948 at 964. 16. (1902) 2 K B 304.

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were left with the sellers, the understanding being that the sellers were entitled to get their money on giving delivery of the goods. A few days later the sellers pledged the goods with a Bank as a cover for their debts and when the buyers demanded delivery, the goods were not forthcoming. In a suit for accounts by the buyers, their account-books showed a credit entry of Rs. 13,471 in favour of the sellers and subsequently a debit entry for the same amount in respect of the same goods. The Trial Court treated the credit entry as correct, but held that the debit entry was in the nature of damages and should show only the value of the goods on the date of conversion. On that basis, as the market had fallen on the date of conversion, it reduced the debit entry of Rs. 13,471 to a smaller figure. *Held,* the entry on the debit side was not damages at all but simply an entry to cancel the other entry on the credit side. Though property in the goods had passed to the buyers, after the pledge with the Bank which constituted conversion, the sellers had put it out of their power to perform the contract and the contract of sale being unenforceable, the entry on the credit side ought to have been expunged, while on the debit side nothing was due at all to the buyer by way of damages.

*Semble* : If the entry on the debit side is to be treated as representing damages, then the proper measure is not the value of the goods when they passed into the hands of the buyers by the contract, but the value of the goods at the time of the conversion. *Chinery* v. *Viall*, 5 H & N 288 and *Gillard* v. *Brittan*, 8 M & W 575 referred to.

Appeals against the decree of the Court of the Subordinate Judge of Kistna at Ellore in O. S. No. 68 of 1922.

The following is a brief statement of the facts of the case taken from the judgment of the Court below :—

The plaintiff sued the defendants for Rs. 7,501-3-0 due on account of dealings carried on by him with *V*, the deceased father of the defendants, from 19th January, 1920 to 16th December, 1920. The only item of dispute was in respect of 800 bags of horse-gram purchased by the plaintiff from *V* on 1st February, 1920. The value thereof, Rs. 13,471-5-3 was entered in the account-books of the plaintiff-buyer as *per patti* sent by *V* according to an arrangement to give credit, but the bags were left in the custody of *V* until the plaintiff should ask for their despatch to Ellore. *V* pledged the goods with the Bank of Madras on 3rd February, 1920. The plaintiff came to know of it only in October, 1920, when he demanded the bags asking *V* to recover the money by sending the railway pass through the Bank. *V* was not in a position to comply with the demand and after some correspondence in the midst of which *V* died, the plaintiff debited the defendants with the sum of Rs. 13,471-5-3, being the same amount for which they were purchased in February, though the market had fallen since the date of purchase. He then brought his suit on the accounts. The Subordinate Judge who tried the case held that as the

debit entry really represented damages, the plaintiff could only debit the value of the bags as on the date when demand for delivery was made, *i. e.*, 27th October, 1920, and fixed the debit entry at Rs. 9,600, based on the then market price, and gave a decree to the plaintiff for the amount claimed in the plaint less the excess in the debit entry. The plaintiff appealed for the amount disallowed (A. S. No. 81 of 1923) while the defendants appealed against the decree passed in favour of the plaintiff (A. S. No. 82 of 1923).

*P. Venkataramana Rao* for appellant.

*K. S. Krishnaswami Aiyangar* and *C. Rama Rao* for respondents.

The Court delivered the following

JUDGMENT :—This is a curious and in some ways rather an interesting case. The suit is really one on accounts, and the dispute arises about two entries in the account, one on the credit side and another of exactly the same amount in respect of the same goods on the debit side. The facts are these : that the present plaintiffs bought goods from the business represented by the defendants to the value of Rs. 13,471 but by arrangement credit was given by the sellers to the buyers and the goods were left in the custody of the sellers, the contract being that the sellers were entitled to get their money on giving delivery of the goods. What happened was, the sale having been about the 1st February, on the 3rd February the sellers pledged these goods with the Bank of Madras as a cover for a debt of their own. The learned Judge has found and we agree with his finding that there is no evidence which can be believed that the buyers consented to this or indeed knew anything about it until late in October. What the learned Judge has done is this. He has treated the credit entry as being a proper credit but when he comes to the debit entry he says, " Oh, no, that is not so. The real damages—because this cross-entry must be in the nature of damages—are damages for conversion and therefore what I have to find is the value of the goods at the date of the conversion. " But he goes on to say : " I find that the real conversion was in October when letters passed between the parties, the buyer pressing for the goods and the goods not forthcoming as the sellers did not have them." He says, therefore, as the value of the goods had very largely dropped in October, instead of letting the debit entry stand at the original figure 13,471 the figure must be cut down to some Rs. 8,000 or 9,000. His

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view was that, as the property in the goods had passed on the day of the sale, therefore on the principle of "*res perit domino*" any loss must fall upon the owner, that is to say, the buyer to whom the property had passed. In our opinion the learned Judge misapprehended the law on the subject, which is very clearly summarised in Benjamin on Sale. The real truth of the matter is that the entry of Rs. 13,471 on the debit side was not damages at all. It was simply an entry to cancel the other entry on the other side. In *Chinery* v. *Viall* (1) which was referred to, a man had sold some sheep upon credit in such circumstances—very like these—that the property had passed to the buyer but the sheep remained in the charge of the seller ; the seller improperly sold them to a third party and the decision of Baron Bramwell in that case is accepted by Benjamin and by the profession generally as completely laying down the true distinction between that case and another class of case to which I will come presently. That was a suit for damages for trover and the learned Judge held that in computing the amount of damages to be paid by the tortfeasor the plaintiff must bring into the account the fact that he had never paid for the sheep, so that, if that value of the sheep at the time of the conversion was, say £120, and the buyer had bought them for £100, his loss is £20 because he would naturally have made the profit of £20 if he had paid the price of the sheep. The learned Judge points out that to give him as was contended the value of the sheep at the time of the conversion as his damages would simply be to give him a present of flock of sheep for nothing.

Another case that was referred to was *Gillard* v. *Brittan* (2). That was a suit in trespass and there Lord Abinger said that you could not set off the price at which the goods in question had been previously sold to the plaintiff because the two causes of action relating to the goods were entirely distinct, so that damages in that case could be given for the trespass without regard to the purchase price. In Benjamin the distinction is pointed out between the two cases. "In *Gillard* v. *Brittan* (2) each party was entitled to his action : the seller for the price, the buyer for damages for trespass to the goods which had passed into his ownership and actual possession. But in *Chinnery* v. *Viall* (1) the *ratio decidendi* was that the seller could not, by reason of his conversion before delivery, maintain an action for the price (not being able to

1. 5 H & N 288. 2. 8 M & W 575.

give the buyer the consideration) and therefore *ex necessitate* it must be allowed for in calculating the buyer's damages in his action, for otherwise the buyer would get the goods for nothing." Mulkoori Gavariah v. Chenna Sariah.

So that in truth and in fact the sellers in this case never were in a position to perform their contract and, if they had brought an action upon it, then the answer would have been "you cannot maintain your action because you had put it out of your power to give the consideration which you were paid for." In such a case what happens is that the contract for sale being unenforceable that the entry on the credit side of the account ought to have been expunged and it is idle to say that by being a party to the entry of payment a man is estopped from saying that the amount was not paid. It is a mere paper record regarding what he hopes will take place. On the other side of the account nothing is due at all to the buyer by way of damages. If the entry on the debit side were to be treated as representing damages for conversion of the goods, then I have no doubt that Mr. Krishnaswami Aiyangar is right in saying that the proper measure is not the value of the goods when they pass into his hands by the contract but the value of the goods at the time of the conversion. The actual conversion was on the 3rd February, as I have said. But Mr. Krishnaswami Aiyangar argued a point with which we will now deal very briefly, *viz.*, that by subsequent conduct the parties notified by the letter of October that the time for performance was extended and the real conversion was when the letter of the 27th October remained uncomplied with. We think that it is not correct and, if these were damages in trover, then the time ought to be fixed as being when the actual conversion took place. But the real answer to the case is—and we agree with Mr. Venkatramana Rao's argument on that—that there is no question of fixing damages in trover here at all, because at the time that the contract ought to have been fulfilled the sellers had put it out of their power to perform the condition precedent which was requisite for their success and the result is not that there is a good claim for the price of goods sold and delivered with a counter-claim for trover but there never was any power in the sellers to sue for the price of the goods at all. That being so, this appeal must be allowed and the decree amended by treating the entry on the debit side as correctly put in the account at the figure 13,471. There will be a

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decree for Rs. 7,501-3-0 with interest from 17th January, 1921 and costs.

The cross-appeal (No. 82 of 1923) will be dismissed as the matter which was raised with regard to the liability of the sons does not arise.

T. S. V. *Decree varied.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Kancherla Pushkaramba being minor by father and guardian Predikete Ramayya and another ... *Petitioner** (*Respondents in A. S. No. 396 of 1923 on the file of the High Court*).

*v.*

Kancherla Nagaratnamma ... *Respondent* (*Appellant in do*).

Pushkaramba v. Nagaratnamma.

*Civil Procedure Code, O. 41, R. 22 and O. 41-A (Madras), Form VI-A—Notice of appeal—Service on respondent in Form VI-A, Appellate Side Rules—No date fixed for hearing of appeal—Memorandum of objections filed more than a month after—If in time.*

The respondent in an appeal in the High Court was served the notice of appeal in the usual form, *i. e.*, Form No. VI-A appended to O. 41-A made under its rule-making powers by the Madras High Court. The notice merely fixed the time for entering appearance, but contained nothing as to the date fixed for hearing of the appeal. The respondent filed a memorandum of cross-objections more than a month after the date of receipt of the notice. *Held,* the memorandum must be taken to be in time. Order 41, R. 22 gave him a period of one month from the date of service on him of notice of the day fixed for hearing the appeal and as Form VI-A fixed only the time for appearance, it cannot be construed as fixing a date for hearing by implication.

Desirability of modifying the language of O. 41, R. 22, or of enacting a rule to provide for its working pointed out.

Petition praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to excuse the delay in preferring and in payment of the deficient Court-fee in S. R. No. 3877 of 1924 memo of cross-objections sought to be preferred in A. S. No. 396 of 1923 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 48 of 1921.

*P. Satyanarayana Rao* for petitioner.

*K. Kameswara Rao* for respondent.

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*C M P No. 2356 of 1924. 26th August, 1924.

Pushkaramba *v.* Nagaratnamma.

The Court made the following

ORDER :—In this case a notice in the form No. 6-A appended to O. 41, Sch. 1, Civil Procedure Code, made by the High Court was received by the 1st respondent (1st petitioner) on 21st December, 1923 and the 2nd respondent (2nd petitioner) on 5th January, 1924. A memo. of cross-objections was filed on 11th February, 1924. The respondent's Vakil claims that he is in time as he has not yet received a notice fixing the date of hearing and it is only within 30 days from the receipt of such a notice that he was to file his memorandum of objections. In framing O. 41-A and Form 6-A fixing time for appearance, O. 41, R. 22 seems to have been overlooked. O. 41, R. 12 requires that a day for hearing should be fixed and even if we can construe O. 41-A as making this unnecessary, there must be some rule guiding the litigants as to how O. 41, R. 22 should be complied with. There is no rule saying that the day fixed for appearance shall be regarded as the day fixed for hearing within the meaning of O. 41, R. 22.

The actual notice now in use cannot be construed as fixing a day for hearing by implication. The appellant's (respondent's) Vakil contends that the 25th day from receipt of notice should be regarded as the day fixed for hearing. This cannot be as the case cannot be heard on the 25th day. It cannot be earlier than the 26th. But the R. 39 of the Rules of the High Court Appellate Side shows that it cannot be within three months after the admission of the appeal. This last consideration shows the undesirability of *implying* the date fixed for hearing. Either O. 41, R. 22 must itself be modified by the High Court or some other rule must be made to provide for its working.

We are constrained to hold that the memorandum of objections is not out of time.

The attention of the Secretary to the Rule Committee will be drawn to this order.

T. S. V. *Memorandum held to be filed in time.*

[In exercise of its rule-making powers, the Madras High Court has now made the following rule. See *Fort St. George Gazette*, dated 13th October, 1925, p. 1335 (Judicial) :—

"Notwithstanding anything contained in R. 22 of O. 41 the period prescribed for entry of appearance by the respondent and filing by him of memorandum of cross-objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him."—*Rep.*]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Pokala Mahalakshmi Ammal ... *Petitioner** (*Plaintiff in O. S. No. 23 of 1923 on the file of the District Court of Chingleput*).

Mahalakshmi Ammal, *In re.*

*Civil Procedure Code, O. 33—Appeal* in forma pauperis—*Right of—Money paid into Court under decree of Court below and drawn out by petitioner sufficient to enable her to pay Court-fee on appeal—Effect.*

The petitioner, who had obtained a decree for maintenance in the District Court, applied for leave to appeal to the High Court from that decree *in forma pauperis,* her case being that she was entitled to a larger amount. Her petition was sent to the District Judge for enquiry whereupon the judgment-debtor paid Rs. 571 into Court to her credit. The District Judge passed an order allowing her to draw out the money, and reported that she had means to pay the stamp duty of Rs. 200 on her appeal.

*Held,* overruling the objection taken to the report, that the petitioner was possessed in the circumstances of sufficient means and was not entitled to appeal as a pauper.

Application under O. 44, R. 1 of Act V of 1908 to be allowed to appeal *in forma pauperis* against the decree of the District Court of Chingleput in O. S. No. 23 of 1923 (O. P. No. 2 of 1923).

*T. R. Ramachandra Aiyar* and *S. Srinivasa Aiyar* for petitioner.

The Court made the following

ORDER :—The petitioner applied for leave to prefer an appeal in this Court from the decree of the District Court, Chingleput, *in forma pauperis.* Her petition was sent to the District Judge for enquiry whereupon the judgment-debtor (she herself has obtained a decree for maintenance and is appealing for a larger amount) paid Rs. 571 (Rupees Five hundred and seventy-one) into Court to her credit. The District Judge passed an order allowing her to draw out the money, and reported that she had means to pay the stamp duty of Rs. 200 (Rupees Two hundred) on her appeal. To this report she objects. Of course Rs. 571 (Rupees Five hundred and seventy-one) is the subject-matter of the suit, though not of the appeal, but this causes no difficulty because it has been ruled in *Krishna Bai* v. *Manohar* (1) that "the subject-matter of the suit" in O. 33, R. 1, Civil Procedure Code,

*C M P No. 1353 of 1925. 12th August, 1925.

1. (1906) I L R 30 Bom 593.

Mahalakshmi Ammal, *In re.*

does not qualify "sufficient means" and the subject-matter of the suit is excluded as being presumably out of the pauper's reach which is not so in the present case [cf. *Dwarkanath Narayan* v. *Madhavrav Vishvanath* (2)]. But another Bombay Bench, *Bai Balagauri* v. *Motilal Ghellabhai* (3), besides holding that the subject-matter of the suit cannot be taken into consideration in calculating the plaintiff's means, apparently overlooking *Krishna Bai* v. *Manohar* (1), has also held that the pauper applicant is not obliged to take out of Court what is deposited or paid in. and cannot, therefore, if he choose to allow the deposit or payment made in Court to remain there, be said to be possessed of sufficient means as if the deposit were actually in his possession. This differs from a previous ruling of the same Court in *Dwarkanath Narayan* v. *Madhavrav Vishvanath*(2) and with all respect I think it a most genuine definition of " possessed " to confine the phrase to actual possession on one's own person. I see no distinction between moneys deposited in Court and ordered to be delivered to a person and moneys lying at a person's credit in a Bank. I should hold that a person with Rs. 571 (Rupees Five hundred and seventy-one) at her disposal in the Court is possessed of sufficient means to enable her to pay stamp-fee of Rs. 200 (Rupees Two hundred). Nor do I think it necessary to contemplate that possibly the Rs. 571 (Rupees Five hundred and seventy-one) might have been attached ; it was not attached when the District Judge passed his order, I also think it unnecessary to go into the question whether supposing the petitioner's estate went into liquidation she would have sufficient balance to pay the stamp-fee. It is enough to find that at the time of hearing her application she had sufficient means.

I have been asked to refer the matter to a Bench because of *Bai Balagauri* v. *Motilal Ghellabhai* (3) but the Bombay rulings are so contradictory that I do not consider it to be in the face of clear authority that I am deciding that petitioner is possessed in the circumstances of sufficient means and not entitled to sue as a pauper.

The petitioner to be allowed to appeal as a pauper is dismissed. The petitioner can pay the requisite fee within one month from the date of this order.

A. S. V. ***Petition dismissed.***

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1. (1906) I L R 30 Bom 593. 2. (1886) I L R 10 Bom 207.
3. (1922) I L R 47 Bom 523.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Ayyaru Pillai ... *Petitioner** (*1st defendant*)

*v.*

Varadaraja Pillai and another ... *Respondents* (*Petitioner—Assignee decree-holder and 2nd defendant*).

Ayyaru Pillai *v.* Varadaraja Pillai.

*Limitation Act, Art. 182 (5)—Decree transferred for execution—Assignee of decree-holder—Application to executing Court for issue of notice under O. 21, R. 22 and transmit records to Court which passed the decree—If a step-in-aid of execution.*

A decree passed by one Court was transferred to another Court for purposes of execution. An assignee of the decree-holder applied to the latter Court for issue of a notice to the judgment-debtor under O. 21, R. 22, Civil Procedure Code, and asked that the records might be sent back to the Court which passed the decree in order to enable him to execute the decree, stating in his application that the decree had been transferred to him by assignment. *Held,* the application was a step-in-aid of execution, for his claim as assignee could be recognised only by the Court which passed the decree and for that purpose it was necessary to send back the records to that Court.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order, dated 15th September, 1923, of the Court of the Subordinate Judge of Tanjore in E. P. No. 356 of 1923 in S. C. No. 493 of 1915.

*S. Ramaswami Aiyar* for petitioner.

*K. R. Rangaswami Aiyangar* for respondents.

The Court delivered the following

JUDGMENT :—This is a petition to revise the order of the Subordinate Judge of Tanjore recognising the assignment of the decree in favour of the petitioner in the Lower Court. The contention of Mr. Ramaswami Aiyar for the petitioner is that it was not competent for the assignee decree-holder to make the application he did to the Court executing the decree. The decree was passed on 12th April, 1915, by the Subordinate Judge's Court, Tanjore. It was transferred for execution to the District Munsif's Court of Tanjore by an application, dated 18th July, 1916. The assignee decree-holder applied to the District Munsif's Court on 10th February, 1920, for the issue of notice to the defendant under O. 21, R. 22 and asked "that the records may be transferred along with the certificate to the Subordinate Judge's Court, Tanjore, for the purpose of further conducting the suit." In it he also stated that

*C R P No. 1124 of 1923. 30th September, 1925.

Ayyaru Pillai *v.* Varadaraja Pillai.

the decree had been transferred to him by assignment. The question is, whether this is an application which it is competent for the assignee decree-holder to make. If he was competent to make the application it would be a step-in-aid of execution under Art. 182 (5) of the Limitation Act. It is well settled that an assignee decree-holder can apply only to the Court which passed the decree for being recognised as the assignee of the decree and it is also settled that he cannot make an application only for the purpose of being recognised as an assignee decree-holder. His application must be one for execution and therefore if he does not apply for execution, his application would not be considered to be a proper application. In this case he asked that the records be sent to the other Court for the further conduct of what he calls a suit and I suppose he meant by it for the execution of the decree. It has been held in *Krishnayyar* v. *Venkayyar* (1) that if a decree-holder applies to the executing Court to send the records to the Court which passed the decree, that application is a step-in-aid of execution and saves limitation. Whether a transferee decree-holder can make a similar application is the question. In order that his claim as assignee decree-holder may be recognised, it is necessary that the papers should be sent back to the Court which passed the decree. It is admitted that the assignee decree-holder was subsequently recognised to have got a proper assignment of the decree by the Subordinate Judge's Court, Tanjore, which passed the decree. Whether in order to get that relief his application to the executing Court to send back the papers to that Court is a competent one is I think in order to enable the Court which passed the decree to recognise him as the assignee decree-holder it was necessary for that Court to have the records sent up by the executing Court and an application for that purpose, I think, comes within the expression of "step-in-aid of execution." In this case, the application was not by assignee decree-holder for execution to the executing Court which no doubt he was incompetent to make till his assignment was recognised. But in order that that Court which passed the decree may pass an order under O. 21, R. 16, it was necessary, though it might not be so in every case, at least in this case that the papers should have been sent back. I hold, therefore, that this application was a proper one which the assignee decree-holder was competent to make. In this connection I would like to refer

1. (1882) I L R 6 M 81.

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to the case reported in *Monorathdas* v. *Ambika Kanta Bose* (2). In that case an application which was made by a person who got a title to a decree by operation of law and who made an application before the Court which passed the decree recognised him as being entitled to execute the decree, was a proper application. In this view of the case I think the order of the Lower Court is correct and this petition is dismissed with costs.

T. S. V. *Petition dismissed.*

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## PRIVY COUNCIL.

[On Appeal from the Chief Court of the Punjab.]

PRESENT :—LORD DUNEDIN, LORD SHAW AND SIR JOHN EDGE.

Musammat Lajwanti and others ... *Appellants**

*v.*

Safa Chand, since deceased, and others ... *Respondents.*

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Musammat Lajwanti *v.* Safa Chand,

*Privy Council—Judgment of—Order in Council made pursuant to—Conformity between—Necessity—Persons with derivative interest in the stake of a suit—Addition as co-plaintiffs with person having real title—Decree in favour of person with real title—Rights of persons with derivative interest—Safeguarding of—Mode of.*

It is the duty of their Lordships to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender to him.

It is out of the question that persons who assert that they have a derivative interest in the stake of a suit can, by getting added as plaintiffs, be associated in a decree in favour of the person who has the only real title. The decree made in favour of such person will, however, be without prejudice to the rights, if any, of the persons with the derivative interest.

Petition to vary an Order in Council made in pursuance of a judgment of the Board reported in 47 M L J 935 : 51 I A 171.

*W. Wallach* for petitioner.

*L. de Gruyther, K. C.* and *S. Hyam* for the other appellants.

19th March, 1925. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—This petition is presented under somewhat peculiar and unsatisfactory circumstances. In the recent appeal of Musammat Lajwanti, and others, judgment was pronounced in which their Lordships said that they would humbly

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*P C Appeal No. 60 of 1922. 19th March, 1925.

2. (1909) 9 C L J 443.

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Lord Dunedin.

advise His Majesty to allow the appeal and pronounce judgment in favour of the plaintiff. That by the expression "plaintiff" their Lordships designated Musammat Lajwanti alone without the addition of the other appellants, is made perfectly clear not only by the use of the singular and not the plural, but also by a sentence in the judgment in which their Lordships, after narrating the claim and suit of the Musammat, added, "Certain persons who might have been respondents backed up the plaintiff and were added as plaintiffs, a very unnecessary proceeding, as no decree could pass in their favour." No representation was made to their Lordships as to there being any error in this.

On the judgment being presented to His Majesty in Council for embodiment in the formal order, the word "appellants" in the plural was used. The plaintiff and appellant, Musammat Lajwanti, now presents this petition to have the order made rescinded and an order pronounced in favour of herself alone. Now in ordinary circumstances this petition would be granted as a matter of course. It is the duty of their Lordships to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender to him.

But the petition is opposed by the other appellants. The counsel who at the hearing pleaded the case of the Musammat now appears for these other appellants and points out that the Musammat herself in her original pleading had set forth that by arrangement between her and three other appellants she was to take only three-fifths of all she recovered, the other two-fifths going to them; and it is further alleged that the Musammat herself has not authorised this petition. An affidavit is presented to that effect. It is met by counter-affidavits.

Their Lordships disregard the affidavits on both sides. They are quite contradictory and it is impossible to determine what the truth is.

Their Lordships have no doubt that the prayer of the petition must be granted in so far as it prays to have the Order in Council made to conform to the judgment pronounced. Even had the facts now brought forward been clearly set before their Lordships, it would not follow that the judgment would have been altered. It is out of the question that persons who assert that they have a derivative interest in the

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stake of a suit can, by getting added as plaintiffs, be associated in a decree in favour of the person who has the only real title. The respondents have an interest in this as well as the plaintiff. At least it is safe to say that no decree would have been granted in favour of all the appellants jointly unless there had either been a consent signified by the respondents or a legal conveyance or assignment produced by the real plaintiff of a share of the subjects of the suit.

At the same time their Lordships wish to do justice and not to allow any one to take advantage of a slip in order to appropriate to himself property that is not fairly his. Their Lordships will therefore humbly advise His Majesty to rescind the order complained of and to pronounce judgment in favour of the plaintiff Musammat Lajwanti alone, but with the addition that this judgment is to be without prejudice to the appellants other than Lajwanti to recover in respect of any conveyance or assignment made or of any contract to convey or assign, such share of the property recovered under the judgment as may appertain to them in respect of such conveyance, assignment or contract.

As their Lordships think that both parties were in fault, there will be no costs of the petition.

Solicitors for petitioner (appellant No. 1) : *T. L. Wilson and Co.*

Solicitors for the other appellants : *W. W. Box and Co.*

A. de M.

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## PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Lahore.]

PRESENT :—LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Mian Ghulam Rasul Khan ... *Appellant**

*v.*

The Secretary of State for India in Council ... *Respondent.*

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Mian Ghulam Rasul Khan v. The Secretary of State for India.

*Evidence—Pedigree case—Public documents—Statements in, made by authorised agents of public in the course of official duty and respecting facts of public interest or required to be recorded for benefit of community—Admissibility to prove facts stated.*

The question for decision was whether the plaintiff-appellant was a Rajput. He would be held to have been a Rajput if he had a title to the use of the term "Mohal."

It was proved beyond all doubt and so found by the appellate Court that in the Revenue Records the plaintiff's family had been shown since 1852 as hold-

*P. C. Appeal No. 2 of 1924. 12th March, 1925.

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ing land; their caste being described as Khayyat Mohal—and there were in evidence extracts from the settlement records of the district for 1853 in which the granduncle and grandfather of the plaintiff were put down as owners of 25 ghumaons of land in the village of *S*, their quaum being mentioned in Kayyat (Mahomedan) and got (*i. e.* sub-tribe) as Mohal. Similar entries were to be found in relation to the settlement of 1882. It was admitted by the Appellate Court that if those records truly described the plaintiff's family as "Mohals" it would prove the plaintiff's claim, but they disposed of that evidence by saying "there is no proof that whoever first caused this entry to be made had any real title to the use of the term 'Mohal'." That was the only link apparently which the Appellate Court found to be absent from the evidence necessary to prove the plaintiff's case. No evidence was, however, given and no suggestion was made that such entries were false or that there was any existing reason why deliberately false entries should have been made.

*Held,* dissenting from the Appellate Court, that evidence of the character adduced, taken from public records for a series of years since 1852 and recorded in accordance with the requirements of the law, could not in a pedigree case be disregarded for the reason stated by the Appellate Court.

In such a case as the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In many cases, indeed, in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence.

Appeal by special leave from a decree of the High Court (October 25, 1920) reversing a decree of the first-class Subordinate Judge, Ludhiana.

*L. de Gruyther*, *K. C.* and *J. M. Parikh* for appellant.

*A. M. Dunne, K. C.* and *K. Brown* for respondent.

12th March, 1925. The Judgment of the Board was delivered by

Lord Carson.

LORD CARSON:—The (plaintiff) appellant is a resident in the District of Ludhiana of the Punjab and is the owner of "culturable lands" in that district. In or about the year 1912 he bought certain other lands and applied for mutation of names. The Deputy Commissioner and, on appeal, the Financial Commissioner of the Punjab, on the 3rd May, 1913, refused the application on the ground that the alienation in question was against the policy of the Punjab Alienation of Lands Act No. XIII of 1900—that Act by S. 3 enacts as follows:—

"3.—(1) A person who desires to make a permanent alienation of his land shall be at liberty to make such alienation where—

(*a*) The alienor is not a member of an agricultural tribe; or

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(c) The alienor is a member of an agricultural tribe and the alienee is a member of the same tribe or of a tribe in the same group.

" (2) Except in the cases provided for in sub-section (1), a permanent alienation of land shall not take effect as such unless and until sanction is given thereto by a Deputy Commissioner.

" (3) The Deputy Commissioner shall enquire into the circumstances of the alienation and shall have discretion to grant or refuse. the sanction required by sub-section (2)."

The grounds of the decision both of the Deputy Commissioner and the Financial Commissioner were that the plaintiff was described in the Revenue Records as " Khayyat Mohal," that that tribe was not one of the notified agricultural tribes of the Ludhiana District, nor was the Mohal tribe to which it corresponded. The plaintiff alleged that although described in the Revenue Record of the land belonging to him as " Mohal Khayyat " he was nevertheless a Rajput and a member of an agricultural tribe. It was admitted that if he was a Rajput he was entitled to become the alienee of the property, as Rajputs were an agricultural tribe and were so declared in the *Punjab Gazette* of the 21st April, 1904.

The plaintiff then instituted this suit in the Court of the District Judge of Ludhiana against the respondent and prayed for a declaratory decree to the effect that he was a Mohal Rajput and that all the entries in the Revenue papers showing his caste as "Mohal Khayyat" were incorrect. The parties went to trial on one issue only, namely, " Is the plaintiff a Rajput ? "

On the 24th June, 1915, the Subordinate Judge, after hearing a number of witnesses and examining a number of documents on both sides, delivered judgment and passed a decree in favour of the plaintiff. The respondent appealed to the High Court of Judicature at Lahore and on the 25th October, 1920, that Court set aside the decree of the Subordinate Judge and dismissed the plaintiff's suit. Hence the present appeal in which, admittedly, the only question for determination is whether the plaintiff is a Rajput.

The case made by the plaintiff, as the Appellate Court states, was that although in the Revenue Records the plaintiff's family has been shown since 1852 as holding land and their caste been described as "Khayyat Mohal" the term "Khayyat" does not denote a tribe, but merely a profession, *viz.* tailoring, that his got (*i. e.*, sub-tribe) is Mohal and that his real tribe is Rajput and that there is no other tribe except that of Rajputs which contains a got of the name of Mohal. The Revenue

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Records of Mauza Shahna give his pedigree back as far as his great-grandfather Nathu who by a pedigree propounded by the plaintiff was alleged to be one of the four sons of Khana who was himself descended in the 13th generation from Mohal. The Appellate Court admitted that if Nathu was proved to be descended as alleged from Khana the plaintiff would have proved his right to be a member of the Rajput tribe. That Court however refused to rely upon the evidence produced as proving that the plaintiff traced his pedigree through his great-grandfather Nathu to Khana and thence to Mohal. In the view that their Lordships take of the other evidence in the case proving that the plaintiff's got is Mohal and that thereby his tribe is Rajput their Lordships do not think it necessary to pronounce any opinion as to whether Nathu was descended from Khana. As the Court of Appeal finds,

> " there seems to be little doubt that 'Mohal' is the name of a sub-division of the tribe of Rajputs, and so far as the evidence in this case shows there is no other tribe in the Punjab which has a got of the name of Mohal"

and the same Court also states :—

> "The conclusion at which we arrive is that, so far as is known, there are no persons in the Punjab who have any real right to be described as 'Mohals' except Rajputs and some Jats, who rightly or wrongly claim that they are really of Rajput origin."

It is clear, therefore, that if the Appellate Court had been of opinion that the plaintiff had a title to the use of the term " Mohal " that Court would have decided in favour of the appellant. Now the first thing to be observed is that in the course of the present litigation S. Bachan Singh, the respondent's pleader, stated on oath that it was conceded " that plaintiff is Mohal got of Khayyat tribe " (*see* statement of 27th July, 1914).

The Appellate Court has found that the mere fact that various members of the family have worked at tailoring cannot be regarded as any proof that the plaintiff is not a Rajput, for, as stated in Ibbetson's Census Report, p. 333, which has been quoted by the learned Subordinate Judge, men of all castes follow the trade ; or as the Subordinate Judge has stated, Khayyats do not make a tribal clan by themselves. It is proved beyond all doubt and so found by the Appellate Court that in the Revenue Records the plaintiff's family has been shown since 1852 as holding land, their caste being described as Khayyat Mohal—and there are in evidence extracts from the settlement records of this district for 1853 in which Ilahia and Gahia, granduncle and grandfather of the plaintiff, are put

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down as owners of 25 ghumaons of land in the village of Shahna, their quaum being mentioned in Kayyat (Mahomedan) and got as Mohal. Similar entries are to be found in relation to the settlement of 1882. It is admitted by the Appellate Court that if these records truly described the plaintiff's family as Mohals it would prove the plaintiff's right in this action, but they attempt to dispose of this evidence by saying " there is no proof that whoever first caused this entry to be made had any real title to the use of the term 'Mohal'. " That is the only link apparently which the Appellate Court has found to be absent from the evidence necessary to prove the plaintiff's case.

Their Lordships cannot share the view of the Appellate Court that evidence of this character, taken from public records for a series of years since 1852 and recorded in accordance with the requirements of the law, can in a pedigree case be disregarded for the reason stated by the Appellate Court. No evidence is given and no suggestion is made that such entries were false or that there was any existing reason why deliberately false entries should have been made. In such a case as the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community (Taylor's Law of Evidence, 10th Ed., S. 1591). In many cases, indeed, in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence. Their Lordships being of opinion that the plaintiff has proved that he is entitled to the description of Mohal, it follows from the facts found by the Appellate Court, and already referred to, that the plaintiff is a Rajput and is entitled to the relief claimed in this action. Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed with costs here and in the Court below and that the decree of the Subordinate Judge should be restored.

Solicitor for appellant : *E. Dalgado.*

Solicitor for respondent : *Solicitor, India Office.*

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Koyyalamudi Subbanna and another ... *Appellants* in all (Respondents-Defendants 2 and 3)*

*v.*

Koduri Subbarayudu and another ... *Respondents (Appellants and plaintiffs).*

Subbanna *v.* Subbarayudu.

*Negotiable Instruments Act, Ss. 28 and 29—Difference between—Promissory notes by guardians and executors—Principle of liability—Description as guardian or executor in the body of note—If excludes personal liability—Signature—Qualification in—Effect of—Liability of executor when limited to assets—Will void—Effect of—Principle of S. 28—Applicability to guardians—English and Indian Law.*

The liability on a promissory note must be determined on the wording of the note and in each case the question is whether the instrument has been so drawn in form as to make the executant liable personally or only in his capacity as agent, guardian, etc. In the case of an agent, the question under S. 28 of the Negotiable Instruments Act is whether the words are sufficiently unequivocal to indicate that he has not made himself personally liable.

The body of a promissory note recited that the debt in lieu of which the note was being executed was originally due by the father of a minor, that the two executants of the note had been appointed guardians and in the operative portion they made themselves unconditionally liable by saying "We shall pay, either of us, on demand," but their representative character was not disclosed in the signature. *Held,* they were personally liable, as the wording of the note did not clearly and unequivocally exclude their personal liability. Where, however, in addition to the above recitals, in the signature portion of the note it was made to appear that the guardians were signing it on behalf of the minor, it amounted to a clear indication that they did not intend to incur personal liability.

Though S. 28 applies in terms only to principals and agents, the principles enunciated therein are of general application and can be applied to cases of guardians and wards. *Sadasuk Janki Das* v. *Sir Kishan Prasad,* (1918) I L R 46 Cal 663 (P C) ; *Ramaswami Mudaliar* v. *Muthuswami Aiyar,* (1915) 30 I C 481 and A S No. 306 of 1922 followed. The section is in one respect different from S. 26 of the English Bills of Exchange Act, for while the English Act requires that the words indicating exclusion of personal liability must be added to the signature itself, the law in India is less rigorous and from the whole of the instrument the intention may be inferred.

The language of S. 29 of the Negotiable Instruments Act is different from that of S. 28 in that there must be express words limiting liability and such liability can only be limited to the extent of the assets of the deceased. Where S. 29 specifically applies to a given set of facts, the principle of S. 28 cannot be invoked.

Where a promissory note is executed by executors as such, the fact that they were not in the eye of the law executors, *e. g.,* the will being valid, cannot

*L P A Nos. 64, 65 and 66 of 1924. 28th August, 1925.

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make any difference as regards their liability and the provisions of S. 29 will apply to the case.

The preamble to a promissory note showed that it was being executed by two persons jointly as executors under a will. The body contained the recital: ' On demand we promise to pay to you.........the sum of Rs. 113 borrowed to serve our need, *i. e.,* to pay on behalf of the deceased testator" and it was signed by them without the qualification as executors being added to their signatures. *Held,* they were personally liable as there was nothing to show they had expressly limited their liability to the extent of the assets received by them as such.

Appeals under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Krishnan, dated 22nd February, 1924, in S. A. Nos. 998, 999 and 1000 of 1921 preferred against the decrees of the Court of the Additional Subordinate Judge of Rajahmundry in A. S. Nos. 3, 4 and 5 of 1920 (A. S. Nos. 152, 153 and 154 of 1919, District Court, Godavari) O. S. Nos. 805, 781 and 780 of 1917, Temporary District Munsif's Court of Razole at Amalapuram.

*A. Krishnaswami Aiyar, B. Satyanarayana* and *K. N. Rajagopala Sastri* for appellants.

*P. Somasundaram* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—These three appeals have been filed against the judgment of Krishnan, J. Defendants 2 and 3 are the executants of the promissory notes in question. In some notes they described themselves as the guardians of the 1st defendant, in others as executors under his father's will. The 1st defendant was and continues to be a minor. The 2nd and 3rd defendants are respectively the maternal uncle and the brother-in-law of the 1st defendant. The plaintiffs in these suits asked for a decree against the 1st defendant to the extent of the assets of his father's estate and against defendants 2 and 3 personally. It is not necessary to say what the decision of the Trial Court was, but the Subordinate Judge dismissed the suits against defendants 2 and 3 and passed decrees against the 1st defendant to the extent of the assets of his father. The plaintiffs preferred Second Appeals to the High Court and Krishnan, J., in all the three suits passed decrees against defendants 2 and 3. As the first defendant had not appealed to the High Court, the decree against him was not disturbed. Defendants 2 and 3 have filed the present Letters Patent Appeals. They contend that they are not liable on the promissory notes.

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On a negotiable instrument only the executant is liable. This proposition admits of no doubt. The question that has in each case to be determined is, on a fair construction, who is the executant of the document ? As Chalmers says :

"It is often difficult to determine whether a given signature is the signature of the principal by the hand of an agent, or the signature of the agent naming a principal." *See* Law of Bills of Exchange, 8th Edition, p. 91.

The law relating to negotiable instruments differs from the ordinary law of contracts in several respects. The liability must be determined on the wording of the note and in each case the question is : Is the instrument so drawn in form as to make the executant liable or the principal liable ? In other words, who is the real executant of the documents ? Is the executant in truth the principal although the agent's signature appears on the bill or is the executant the agent although the principal is named ?

So far as the Indian Law is concerned, S. 28 of the Negotiable Instruments Act enacts the rule of law applicable to agents. The material portion of the section runs thus :

"An agent who signs his name to a promissory note without indicating thereon that he signs as agent or that he does not intend thereby to incur personal liability is liable personally on the instrument."

Under the section an agent signing the note *prima facie* is liable but he may exclude his liability by indicating on the note that he signs as agent or that he does not intend to incur personal liability. In each case the question is, are the words sufficiently unequivocal to indicate that the agent has not made himself personally liable ?

S. 28 of the Indian Act is in one respect strikingly different from S. 26 of the Bills of Exchange Act, 1882. The English Act requires that the words indicating that the personal liability is excluded must be added to the signature itself. The Indian Act is less rigorous and from the whole of the instrument the intention may be inferred.

The most useful case on the subject is *Sadasuk Janki Das* v. *Sir Kishan Prasad* (1). Their Lordships of the Judicial Committee point out that as the document passes from hand to hand it is of the utmost importance that the responsibility is made plain and can be instantly recognised. The English theory of bills, as Chalmers observes in his introduction to the work already quoted, is the banking or currency theory

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and in England, bills have developed into a perfectly flexible paper currency. It follows therefore that as the note passes from hand to hand the real name of the person liable upon it must be disclosed.

In the light of this principle I shall first examine the promissory note in Letters Patent Appeal No. 66 of 1924. The note is signed by the two guardians. Their representative character is not disclosed in the signature. In regard to the body of the note, the following points are no doubt in favour of the appellants :—

(1) The debt is mentioned as having been originally due by the minor's father ;

(2) It is stated that their ward is a minor and that they were appointed guardians.

But the language in the opening portion of the note is ambiguous. It is susceptible of two meanings : literally it means that the guardians are executing the note because their ward is a minor. What may be said to be the idiomatic meaning is, that the guardians are executing the note on behalf of the minor.

In the operative part of the note, they make themselves unconditionally liable. They say :—

"We shall pay, either of us, on demand."

Who are referred to by this word 'We'? The words in the preamble being doubtful and there being no ambiguity in regard to the signature, the proper view to take is, that any one reading the note will reasonably connect the word 'We' with the names appearing at the bottom of the note.

It is true that the debt of the minor's father is mentioned in the body of the document. But, on this, does it necessarily follow that the executants are not personally liable ? Supposing the guardians had been pressed for payment of the debt and they undertook to pay the amount personally themselves, can it be said that such a note as the present could not have been passed ? In my opinion, a mere allusion to the pre-existing debt does not clinch the question. On the whole I think that the wording does not clearly unequivocally exclude the personal liability of the executants and that Krishnan, J.'s decision in regard to this note must be upheld.

Before passing on to the next note, I desire to make one observation. Unlike S. 26 of the English Act which deals generally with the liability of persons signing in any representative capacity, S. 28 of the Indian Act in terms applies only to

single case of agents and principals. But it seems to me that there is no reason to make the scope of the section so narrow and indeed their Lordships of the Judicial Committee in the case already quoted [*Sadasuk Janki Das* v. *Sir Kishan Prasad* (1).] first state the principles as of general application and then proceed to say that the sections of the Negotiable Instruments Act contain nothing inconsistent with those general principles. In *Ramaswami Mudaliar* v. *Muthuswami Aiyar* (2) and the unreported Appeal No. 306 of 1922 on the file of the High Court, the principle of S. 28 is tacitly assumed to be applicable to cases of guardian and ward.

Now I pass on to the note in L. P. Appeal No. 65 of 1924. This bears a very close resemblance to the note which I have just dealt with. But there is a striking difference in one particular, that in the signature portion it is made to appear that the guardians are signing the note on behalf of the minor. The point is thus left no longer in doubt, and, on a construction of the note, I find that the guardians have clearly indicated that they did not intend to incur personal responsibility. In my opinion, therefore, Krishnan, J.'s decision in regard to this note is wrong, and cannot be supported.

I shall next deal with the promissory notes in L. P. Appeal No. 64 of 1924. To my mind, these present no difficulty. The appellants do not describe themselves as guardians but as executors and the section that applies is S. 29 of the Negotiable Instruments Act. The relevant portion of that section is as follows :—

> "A legal representative of a deceased person who signs his name to a promissory note is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such."

The language of S. 29 is widely different from that of S. 28. In the first place, under S. 28 it is sufficient to indicate that personal liability is excluded. Under S. 29 there must be express words limiting the liability. Secondly, under S. 28 the agent's liability may be altogether excluded, but under S. 29 the executor's liability can only be limited to the extent of the assets.

These notes purport to have been executed by the appellants in their capacity as executors. When S. 29 specifically deals with the case, it is not permissible to invoke the principle

1. (1918) I L R 46 C 663 : 36 M L J 429 (P C). 2. (1915) 30 I C 481.

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of S. 28. The appellant's learned vakil has contended that his clients were not in fact executors because the minor's father could not have made a valid appointment of executors. Granting this to be so, it does not in my opinion make the slightest difference. We are concerned not with the fact whether they are executors but only whether they have described themselves as executors. It is not to be expected that when the paper passes from hand to hand every successive holder is to satisfy himself as regards the truth of the statement in the note ; and I am not prepared to accept the contention that the section has no application unless the executant happens to be in fact a legal representative. I am, therefore, of the opinion that Krishnan, J.'s judgment in regard to this note is right and must accordingly be confirmed.

I feel that it is necessary that I must add one word. The Lower Court has passed a decree against the minor and he has not filed an appeal challenging its correctness. We are therefore not concerned with the propriety or otherwise of the decree against the minor. But nevertheless it seems to me that although the agent is personally liable on the note, there is nothing to prevent the Court from passing a decree against the minor himself provided that the plaint is framed in an alternative form suing the guardian on the note and the minor alternatively on the consideration. [See *Sadasuk Janki Das* v. *Sir Kishan Prasad* (1) and *Krishna Aiyar* v. *Krishnaswami Aiyar* (3)]. This question, however, does not here arise and need not be pursued further.

I may state in conclusion that Mr. Alladi Krishnaswami Aiyar, the learned vakil for the appellants, desired to raise a new point, one relating to the rule of election as laid down in *French* v. *Howie and Wife* (4) and *Moore* v. *Flanagan and Wife* (5), but that we did not permit him to raise this point as he did not raise it before Krishnan, J. and attempted to do so for the first time before us.

The result is that L. P. Appeals Nos. 64 and 66 of 1924 are dismissed with costs and L. P. Appeal No. 65 of 1924 is allowed and the suit dismissed with costs throughout against defendants 2 and 3.

Madhavan Nair, J.

*Madhavan Nair, J.* :—These Letters Patent Appeals are directed against the decision of Krishnan, J., in three second appeals which arose out of suits instituted by the plaintiff for

1. (1918) I L R 46 C 663 : 36 M L J 429 (P C). 3. (1900) I L R 23 M 597 (F B)
4. (1906) II K B 674. 5. (1920) I K B 919.

the recovery of the money due to them on promissory notes executed by defendants 2 and 3. The 1st defendant is the minor son of one Veeranna who died leaving debts. Though the property belonging to him is joint family property, Veeranna nevertheless executed a will naming defendants 2 and 3 as executors. Though the document is invalid so far as it purported to deal with joint family property, defendants 2 and 3 entered upon the management under the will and executed the various suit promissory notes to Veeranna's creditors. The plaintiffs in these suits claimed decrees against defendants 2 and 3 personally as the makers of the promissory notes and against the estate of the 1st defendant. The District Munsif gave a decree against defendants 2 and 3 personally and dismissed the suits against the minor's estate. Both the plaintiffs and defendants 2 and 3 preferred appeals to the Subordinate Judge who gave decrees against the estate of the minor dismissing the suits against defendants 2 and 3. The minor, *i. e.*, the 1st defendant, did not appeal to the High Court but the plaintiffs preferred second appeals claiming personal decrees against defendants 2 and 3. The learned Judge, Krishnan, J., set aside the decrees passed by the Subordinate Judge with the result that the plaintiffs in the High Court succeeded in obtaining the decrees against defendants 2 and 3 personally.

The question for determination in all these Letters Patent Appeals is the same, namely, whether defendants 2 and 3 are personally liable under the suit promissory notes.

*L. P. A. No.* 64 *of* 1924 :—As there is some difference in the language of the promissory notes in the various suits and as the argument advanced by the learned vakils on both sides had reference to the language, it will be useful to refer to these promissory notes at the very commencement. Exs. A, B, E and F are the four promissory notes in this Letters Patent Appeal against S. A. No. 998 of 1921. Ex. A states in its preamble that it is " executed by Subbanna and Satyanarayana (defendants 2 and 3) jointly as executors appointed in accordance with the registered will of the late Chinna Veeranna, his son Viswanatham being a minor. . . . . ." In its body it states : " On demand we promise to pay to you or to your order the sum of Rs. 113-2-0 only the amount borrowed to serve our need, *i. e.*, the amount we have agreed to pay on behalf of the aforesaid Chinna Veeranna. . . . . . " This promissory note is signed by the two defendants without

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the qualification as executors being added to their signatures. Ex. B is similar to Ex. A except that in its body the statement "the amount we have agreed to pay on behalf of the aforesaid Chinna Veeranna" is absent. It simply says: "On demand we promise to pay to you or to your order the sum of Rs. 585-10-6 only the amount borrowed to serve our need, *i. e.*, the amount of principal and interest on the promissory note executed by the late Chinna Veeranna." The preambles of Exs. E and F are similar to those of Exs. A and B, with this difference, that in the preamble of Ex. F "his son Viswanatham being a minor" is absent. In the body of these two promissory notes, Exs. E and F, we find the expression "We both individually promise to pay to you or to your order the sum of Rupees........." which does not appear in Exs. A and B. These promissory notes run thus: "We both individually promise to pay to you or to your order the sum of Rupees..........on the promissory note executed by the late Chinna Veeranna." In the signature portion of all these promissory notes the names of defendants 2 and 3 appear without any qualification. Though these promissory notes thus present some special features they agree in this respect that each of them is stated in the preamble to have been executed by defendants 2 and 3 "as executors" and signed by them without disclosing their representative capacity.

Mr. Krishnaswami Aiyar, the learned vakil for the appellants, argues that the language used in these promissory notes distinctly shows that the appellants have not undertaken any personal liability to pay the promissory note debts and that the learned Judge was wrong in applying S. 29 of the Negotiable Instruments Act in deciding this case, inasmuch as it is clear that defendants 2 and 3 cannot in law be considered executors as the deceased Veeranna had no power to execute a will, the property being joint family property. S. 29 being inapplicable and the language of the documents showing that there was no personal liability, the learned vakil argues on the analogy of various decisions which he has brought to our notice that in this case the only decree that could be passed is one against the estate of the deceased Veeranna.

The important question for consideration is whether S. 29 of the Negotiable Instruments Act applies to this case. S. 29 runs as follows:—

"A legal representative of a deceased person who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon, unless

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he expressly limits his liability to the extent of the assets received by him as such."

The term "legal representative" includes executors or administrators. If this section is applicable, defendants 2 and 3 are liable personally on these promissory notes, as they say in the preamble of the notes that they have executed them "jointly as executors appointed in accordance with the registered will of the late Chinna Veeranna." The argument that defendants 2 and 3 are not, strictly speaking, executors and therefore S. 29 is inapplicable cannot be accepted; for we are dealing with promissory notes and it is well known that those are intended to pass freely from hand to hand and a party who takes a negotiable instrument of the class we are dealing with is not expected to decide for himself whether the person who has executed the instrument in his capacity as an executor is really an executor in the eye of the law or not, before accepting the note. If this principle is not given effect to, the very object of a negotiable instrument would be defeated. Defendants 2 and 3 having described themselves as executors, persons dealing with them on the promissory notes will naturally treat them as executors, and the promissory notes will be passed on from hand to hand distinctly on that understanding. It is necessary therefore that S. 29 should be applied in a case like the present one; and if so, defendants 2 and 3 are clearly liable personally, unless they are able to show that they have expressly limited their liability to the extent of the assets received by them as such. The language of the promissory notes that I have already referred to speaks with no uncertain voice. In none of them is the liability of the executants expressly limited in any way to the extent of the assets received by them as such, while in all of them there is a distinct promise to pay made by the executants. The cases cited by Mr. Krishnaswami Aiyar in this connection need not be considered in detail, as most of them deal with the question how far can recourse be had to the estate on notes executed by an executor, or guardian of a minor, or trustee of a property. The decisions in *Krishna Chettiar* v. *Nagamani Ammal* (6), *Ramajogayya* v. *Jagannadhan* (7) and *Ammalu Ammal* v. *Namagiri Ammal* (8) and the other cases cited by him do not deal with the question with which we are here concerned. As the executants of the promissory notes in question have

6. (1915) I L R 39 M 915. 7. (1918) I L R 42 M 185 : 36 M L J 29.
8. (1917) 33 M L J 631.

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not in any way expressly limited their liability to the extent of the assets received by them, I must hold that S. 29 of the Negotiable Instruments Act applies to this case and that the decision of the learned Judge is right. I dismiss this Letters Patent Appeal with costs.

*L. P. A. Nos.* 65 *and* 66 *of* 1924.—The language of the promissory notes in these appeals is different from the language of the notes already examined. The preamble speaks of these notes as promissory notes executed " by guardians under the will of the late Veeranna, as Viswanatham happens to be a minor. "

*L. P. A. No.* 66 *of* 1924.—In L. P. A. No. 66 the body of the note, amongst other things, contains the statement that " On demand the amount of principal and interest accrued up to date.........will be paid by either of us. " In this appeal the two executants signed the promissory note with their names without describing themselves as guardians. The language of the promissory note, Ex. A, which I have noticed above, distinctly shows that the executants intended to incur personal liability on this note. Though there is no specific provisions in the Negotiable Instruments Act regarding the liability of a guardian on a promissory note executed by him, it seems to me that the principle underlying S. 28 regarding the liability of an agent signing a promissory note may well be applied to such a case. S. 28 of the Act deals only with the case of agents and principals, in this respect differing from S. 26 of the English Act which deals generally with the liability of persons signing in a representative capacity. In two decisions of this Court the principle underlying S. 28 of the Negotiable Instruments Act has been applied in deciding on the liability of a guardian executing a promissory note on behalf of the minor [*Ramaswami Mudaliar v. Muthuswami Aiyar* (2)]. The 2nd defendant in the case was described in the body of the note as the guardian of the 1st defendant who was at its date a minor, and the necessity for borrowing was stated in it as arising from the 1st defendant's father's debt. The learned Judges state : "We are not, however, prepared to treat those facts alone as sufficient to indicate that 2nd defendant signed as 1st defendant's guardian or did not intend to incur personal liability." The 2nd defendant was therefore held liable on the promissory note. The extract from the judgment shows that the learned Judges in deciding the case have assumed that the principle

2. (1915) 30 I C 481.

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of S. 28 of the Negotiable Instruments Act is applicable to the case of the guardian and ward. [*See* also the unreported decision in Appeal No. 306 of 1922 on the file of the High Court]. The decision of the Privy Council in *Sadasuk Janki Das* v. *Sir Kishan Prasad* (1) supports the view that a general application can be given of the principle underlying S. 28 of the Negotiable Instruments Act. Defendants 2 and 3 in this case have not indicated that they signed the promissory note as agents or that they did not intend to incur personal liability. On the other hand, the language of the promissory note, in my opinion, distinctly shows that they are personally liable. The decision of the learned Judge is, therefore, right and this Letters Patent Appeal No. 66 should be dismissed with costs.

*L. P. A. No. 65 of 1924* :—In this appeal the language used in the preamble and in the body of the promissory note indicating the liability of defendants 2 and 3 is like the language in the promissory note in L. P. A. No. 66, but the executants in signing the promissory note described themselves in the signature portion as "guardians of minor Viswanatham." This is a distinctive feature of this note and in this respect it differs from the promissory note, Ex. A, just noticed. When we read the promissory note bearing this feature in mind, the conclusion is irresistible that the executants have signed this note merely as guardians excluding thereby their personal liability. It therefore follows that, on the language of this note, defendants 2 and 3 are not personally liable. As the construction that I am putting on the language of this promissory note is different from that given to it by the learned Judge, the decision in S. A. No. 999 of 1921 must be set aside. The plaintiff in this case will only be entitled to a decree against the minor's estate and not against the guardians personally. This Letters Patent Appeal is allowed with costs throughout.

As pointed out by my learned brother, we have not allowed the learend vakil for the appellants to argue a new point which he desired to raise in these appeals.

*L. P. A. Nos. 64 and 66 of 1924 dismissed.*
*L. P. A. No. 65 of 1924 allowed.*

T. S. V.

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1. (1918) I L R 46 C 663 : 36 M L J 429 (P C).

# PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner, Central Provinces.]

PRESENT :—LORD SHAW, LORD BLANESBURGH, SIR JOHN EDGE, AND MR. AMEER ALI.

Subhan Ali ... *Appellant**

*v.*

Imami Begam and others ... *Respondents.*

P. C.

Subhan Ali *v.* Imami Begam.

*Inam grant—Construction—Grant by Government to A and his male descendants in perpetuity—Estate conveyed by—Female descendants of grantee if entitled to share of estate or of its income so long as there was no failure of male descendants—Berar Inam Rules—Scope and effect of—English Law—Base fee in—Nature of—Suit by female heirs of grantee against male heir for partition and for share of income—Right to income of plaintiffs for their lives* res judicata *by reason of prior suit—Decree to be passed in such a case—Declaration of right to same—Working out of right in execution proceedings—Provision for.*

A base fee in English Law is a grant in terms general, its limitation in point of duration being due only to the fact that the grantor was possessed of no estate enabling him to extend the grant, however general its terms, for any period subsequent to the extinction of his own issue.

It is impossible to hold that an order that an estate shall "be continued to the male descendants" of a certain person means that it shall be continued to the male and female descendants of that person so long as there is no failure of male descendants. The estate conferred by such an order is not analogous to a base fee in English Law.

Where an inam certificate was issued stating that the grant—one for personal maintenance—was "to be continued rent free in perpetuity to present holder and his male descendants," *held,* that the only grant was to the male descendants themselves, that the word "to" could have no other than its ordinary meaning attributed to it, and it could not be treated as meaning "during the existence of" or "pending the failure of" and that, even if the word were capable of being so extended, it would be difficult, from the words, to evolve a general grant in terms sufficiently wide to include female descendants within its scope.

What are known as the Berar Inam Rules, it is true, lay down the conditions which are usually to accompany an inam grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant. And where the right of inheritance is by the certificate confined to a particular class of descendants which in its exclusion of all females from enjoyment is in terms unambiguous, there is no reason why the grant in these terms should not have effect.

Under an inam grant by Government "to be continued rent-free in perpetuity to present holder and his male descendants," the succession of each male descendant of the grantee to the inam does not involve a re-grant by Government. It is merely a continuance of the grant to the descendant in accordance with its originally declared terms.

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*P C Appeal No. 102 of 1923. 25th May, 1925.

P. C.

Subhan Ali *v.* Imami Begam.

An inam grant was made to *M* and his half-brother *A* and their male descendants in perpetuity. The suit out of which the appeals arose was brought by the daughters of *M* against the grandson by the son of *A*. The suit was for partition and separate possession of the plaintiffs' shares in the inam estate, and for payment of their due proportions of the income for the three years immediately preceding the institution of the suit in February, 1916. It was found that on the right construction of the grant the plaintiffs were not entitled either to a partition or to a share of the profits of the estate. It appeared, however, that in a prior civil suit between the parties or their predecessors-in-interest there was a binding adjudication to the effect that the plaintiffs were entitled during life to the there defined share of annual income of the inam estate. The Court below by its decree dismissed the suit so far as it was one for partition and separate possession of the inam but affirmed the decree below in respect of the plaintiffs' claim to income. To avoid successive suits to establish plaintiffs' claim to income, which was *res judicata* by reason of the prior adjudication, their Lordships added to the decree under appeal a declaration that by virtue of the decree in the prior suit, each of the plaintiffs was during her life and as against the defendant and his successors-in-interest in the property in dispute, entitled to the share of the income thereof adjudged to them in the prior suit, and liberty should be reserved after each year to apply to have the amount of such income determined by further proceedings in the suit and declared in a further decree.

Consolidated Appeal and Cross-appeal (No. 102 of 1923) from a decree of the Court of the Judicial Commissioner, Central Provinces (April 5, 1921), varying a decree of the Additional District Judge of Akola, West Berar.

*L. de Gruyther, K. C.* and *J. M. Parikh* for appellant.

*Sir G. Lowndes, K. C.* and *E. B. Raikes* for respondents.

25th May, 1925. The Judgment of the Board was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—The suit out of which these appeals arise was brought by the plaintiffs for partition and separate possession of their shares in an inam estate or jaghir in Berar, and for payment of their due proportions of the income for the three years immediately preceding the institution of the suit in February, 1916. The estate now comprises the whole of the two villages of Barmi and Dhotra, and three fields in the village of Ganuhpur in the Murtizapur Taluq of the Akola district. The original appellant, Mir Subhan Ali, the present certificate holder and in sole possession of the inam, was the principal defendant.

The trial took place before the Additional District Judge at Akola. He, by his decree, dated the 2nd April, 1918, allowed the plaintiffs' claims in full. On appeal, the Court of the Judicial Commissioner, Central Provinces, Berar Jurisdiction, by a decree of the 5th April, 1921, dismissed the

P. C.

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suit so far as it was one for partition and separate possession of the inam, but approved the judgment of the Court below in respect of the plaintiffs' claim to income. With the decree of the Judicial Commissioners both parties are dissatisfied, and in the present appeal and cross-appeal now consolidated, the plaintiffs, who were cross-appellants, ask that the decree of the Additional District Judge should be restored, while the defendant, Mir Subhan Ali, the original appellant, asks that the plaintiffs' entire claim should be rejected and their suit dismissed.

The fundamental question at issue is one of construction, namely, whether the beneficial interest in the inam granted to a common ancestor of the parties and continued by the British Government in 1866 passes under the terms of the grant then made to all the heirs of the grantees according to Shia Mahomedan law or whether that interest devolves upon male descendants only. There is, however, a further question, namely how far the rights of the parties, whatever otherwise on construction they might have been held to be, are now regulated by a decree said to be binding upon the defendant, Mir Subhan Ali, and made by the Judicial Commissioners in a suit brought by the plaintiffs against (*inter alios*) the father and predecessor in estate of that defendant.

The facts of the case are not free from complexity, but they have been set forth at length and with perfect accuracy in the judgment of the Additional Judicial Commissioners. Their Lordships accordingly will re-state them only so far as is necessary to explain the conclusions at which, on the whole matter, they have themselves arrived.

Lands now represented by the estate in question had, from the end of the eighteenth century, been held under sanads from the Government of H. H. the Nizam by a succession of holders in direct male descent in a Shia Mahomedan family to which all the parties to these proceedings belong. The Extra-Assistant Commissioner who, in 1864, inquired into the origin of the grant and the claims of the then holders reported that the grant was valid and that its enjoyment had been long and uninterrupted. He reported :

"It is not hereditary according to the terms of the *sanads*, but practically the grant has been enjoyed by four successive incumbents during the space of more than 70 years and has assumed that right in a liberal point of view. I think the grant should be confirmed and continued to the present claimant and his descendants male,"

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These proposals of the Extra-Assistant Commissioner were supported both by the Deputy Commissioner and by the Commissioner, and to give effect to them the Resident recommended that the estate should

"be continued to the present holder and his male descendants in perpetuity."

On the 3rd December, 1866, this recommendation of the Resident was sanctioned by the Government of India, and an inam certificate was issued, stating that the grant—one for personal maintenance—was

"to be continued rent free in perpetuity to present holder and his male descendants."

The "claimant" and "present holder" so referred to was one Munawar Ali, the father of the plaintiffs. To him the inam certificate was issued, and the fundamental question between the parties already referred to depends upon the true construction of these words in it.

And yet not quite so. For if, as has apparently been assumed in the copious stream of litigation which the grant has originated, an agnatic line of male descent is for one purpose or another thereby prescribed, then on a strict interpretation the grant has long since determined, inasmuch as Munawar Ali died in July, 1896, leaving three daughters only—the plaintiffs and another—and no son.

But, as might well be supposed, none of the parties contend for this result. Nor has it, in fact, eventuated. It has been brought to the notice of the Extra-Assistant Commissioner in the course of his inquiry that Amjad Ali, the second son of the previous holder, Muzhar Ali, and a half-brother of Munawar Ali, was in receipt of half the income of the estate by a title which Munawar Ali, the "claimant" or "holder" made no effort to displace. In the original certificate his position was ignored, possibly by inadvertence. In 1871, however, the omission was recognised and rectified, and in that year Amjad Ali's name was, by Government, entered in the certificate as sharer in the estate with Munawar Ali. The effect, it has been assumed, is that the grant must be construed as if made to Munawar Ali and Amjad Ali and their male descendants in perpetuity, or, as a more compendious statement leading in the state of his family to the same result, as if made at an earlier date to Muzhar Ali and *his* male descendants in perpetuity. The true meaning of these words or their equivalent, therefore, is the fundamental question in the suit.

Amjad Ali died in 1880, and his son, Khairat Ali, was, without objection, shown in his place on the certificate as a sharer

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along with Munawar Ali. The latter, as has already been said, died in 1896, in the life-time of Khairat Ali. Of the three daughters whom he left, two are the present plaintiffs. The third, Aziz Begam, married Khairat Ali as his second wife. As Munawar Ali left no son, Khairat Ali was entered as the sole certificate holder in respect of the whole estate. This was objected to by the present plaintiffs and by their mother, Moghli Begam, Munawar Ali's widow, who survived him. They appealed to the Commissioner against the order that Khairat Ali was to be sole certificate holder. Their claim was, that while the grant according to its terms was only to endure so long as the grantee's male line survived, the estate during the subsistence of the grant was to be enjoyed beneficially by all the heirs of the grantee, including females, according to Shia Mahomedan law. The Commissioner refused to take this view of the grant, and he dismissed the ladies' appeal on the ground that women could not succeed to the inam, which was to be continued to male descendants only. Khairat Ali died in 1914, and his eldest son by his first wife, Subhan Ali, the present defendant, was, in due course, entered in the register as certificate holder. His appointment as such was once more opposed, as Khairat's had been, by Imami Begam, one of the present plaintiffs. Her opposition was again overruled. The inam was to be continued to male descendants only.

The construction placed by the Revenue Courts upon the grant has therefore been uniform. But the plaintiffs in the present suit contend that it is erroneous, and they rely both as a *res judicata* and on their merits upon decisions of the Civil Courts in which their own view of the grant has been accepted. Their Lordships may here so far anticipate as to announce that the plea of *res judicata* will not avail the plaintiffs to the full extent of their claims in these proceedings. This fundamental question of construction must therefore be decided. It is convenient to proceed at once to its consideration.

Upon it their Lordships feel no doubt that the meaning attributed to the words in question by the Revenue Courts and by the learned Additional Judicial Commissioners in the present suit is correct. As it seemed to the Judicial Commissioners, so it seems to them, impossible to hold that an order that an estate shall "be continued to the male descendants" of a certain person means that it shall be continued to the male and female descendants of that person so long as there is no failure

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of male descendants. It was sought in argument before the Board to treat the estate conferred as being analogous to a base fee in English law. Such analogies are rarely helpful and very frequently they are misleading. But here the suggested analogy is non-existent. A base fee is a grant in terms general, its limitation in point of duration being due only to the fact that the grantor was possessed of no estate enabling him to extend the grant, however general its terms, for any period subsequent to the extinction of his own issue. But here there is no grant at all in general terms. The only grant is to the male descendants themselves—a very limited expression—and the word "to" can have no other than its ordinary meaning attributed to it. It cannot be treated as meaning "during the existence of" or "pending the failure of," and even if the word were capable of being so extended, their Lordships would still have difficulty in seeing how, from the words, a general grant could anywhere be evolved in terms sufficiently wide to include female descendants within its scope.

The learned Trial Judge found such a grant by holding that the certificate here was governed by what are known as the Berar Inam Rules, and particularly by No. V. of these rules, and that the grant must within that rule be treated as having been made in favour of "direct lineal heirs and undivided brothers"—an expression which would include females. Their Lordships agree with the Additional Judicial Commissioners in thinking that the learned Additional District Judge erred in attributing to these rules an operation universal and unqualified. The rules, it is true, lay down the conditions which are usually to accompany an inam grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant. And where, as in the present case, the right of inheritance is by the certificate confined to a particular class of descendants which in its exclusion of all females from enjoyment is in terms unambiguous, there is no reason known to their Lordships why the grant in these terms should not have effect. As regards decisions upon the meaning of other grants cited in argument, their Lordships need only say that no authority was brought to their notice which leads them to qualify the effect which they attribute to the words of grant in the present case.

So far, therefore, the claim of the plaintiffs, whether for partition or for a share of the profits of the estate, is not established. But the bearing and effect upon these claims of

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decrees in previous suits brought by the plaintiffs in the Civil Court remains to be considered. These are four in number. It will, however, suffice to deal in any detail with one of them only—namely, the Civil Suit No. 137 of 1904, filed in the Court of the Civil Judge of Amraoti by the present plaintiffs against Khairat Ali, and his three children by Aziz Begam. The claim there made was for a share of profits of the estate for 1903-4 and for

> "a declaration that as heirs of Munawar and his widow, Moghli Begam, they got a half share in the jaghir, and that they are entitled to the use of fruit and fodder from the villages."

The judgment awarded the plaintiffs a decree for the share of the profits claimed, and declared that "the plaintiffs have 109|144 of half-share of the jaghir villages in dispute" This decree was affirmed in appeal and second appeal. "The entry," says the Additional Judicial Commissioner in his judgment on the second appeal,

> "regulates the duration of the grant but not the enjoyment of it as between the heirs of the grantee, and the inheritance devolves under the ordinary law in force in the family. No authorities to the contrary have been cited."

In the later suits this view was also taken. In the second and third the plaintiffs' share of profits for the years 1904-5 to 1909-10 were claimed and awarded against Khairat Ali : in the fourth and last suit, brought against all the children and widow of Khairat Ali after his death in 1914, the claim was for a share of the income of 1911-12, and a decree for such share was made against the defendants to the extent of the assets of Khairat Ali in their hands.

Now it was not disputed by the defendant before the Board that the decision in Civil Suit No. 137 of 1904 was binding as between the parties to it and their representatives in interest to the extent that the plaintiffs are entitled during life to the there defined share of annual income, but it was contended that the defendant, Subhan Ali, does not claim through Khairat Ali, so that the decree is not binding upon him. Their Lordships concur with the learned Additional Judicial Commissioners in rejecting this contention. The succession of the defendant to the inam did not involve a re-grant by Government. It was merely a continuance of the grant to him in accordance with its originally declared terms. He holds the estate burdened with the obligation of recognising the rights of the plaintiffs to the share of income declared by the decree in the suit of 1904.

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But no further. In that suit partition was not asked for, and their Lordships prefer in these appeals to deal with the question of partition as one which was not there decided, because it was not raised. There are grounds on which a decree of partition might have been refused to the plaintiffs even by a Court which interpreted the grant as did the Additional Judicial Commissioners in that suit. In their judgment accordingly there can be no question of *res judicata* in the plaintiffs' favour so far as their claim to partition is concerned, and on the view which their Lordships take of the grant that claim cannot, as has already been stated, be maintained.

Their Lordships in the circumstances can feel no surprise that Khairat Ali resisted all claims of the plaintiffs to a share of the income of the estate and was unwilling to accept for subsequent years the principle of the decree in the suit of 1904. But it is right that that position should now, without further question, be accepted, and that the plaintiffs should not have imposed upon them the burden of instituting successive suits to establish a claim which, as between the parties, is no longer open to discussion.

Their Lordships accordingly think that there should be added to the decree appealed from a declaration that by virtue of the decree in the Civil Suit No. 137 of 1904, each of the plaintiffs is during her life and as against the defendant and his successors in interest in the property in dispute entitled to 109|288 of half-share of the income thereof, and liberty should be reserved after each year to apply to have the amount of such income determined by further proceedings in the suit and declared in a further decree.

With that addition to the decree, inserted to spare the parties unnecessary expense, their Lordships are of opinion that the decree appealed from should be affirmed and both appeals dismissed.

Their Lordships will humbly advise His Majesty accordingly.

There will be no order as to the costs of these appeals except that in accordance with the Order in Council of the 30th May, 1924, granting to the plaintiffs special leave to cross-appeal, the costs of the defendant of that application must be paid by those cross-appellants.

Solicitors for appellant : *T. L. Wilson and Co.*

Solicitor for respondents : *E. Dalgado.*

A. de M. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE RAMESAM.

Imani Satyanarayana and others ... *Appellants** (*Defendants 2 to 5*)

*v.*

Devarakonda Satyanarayanamurthi and another ... *Respondents* (*Plaintiff and Defendant 1*).

Satyanarayana *v.* Satyanarayanamurthi.

*Hindu Law—Debts—Mortgage by father—Personal liability barred—Subsequent mortgage to discharge prior one—Liability of sons—Antecedent debt.*

A Hindu father incurred a mortgage debt and after his personal liability had become barred executed a subsequent mortgage to discharge the prior one. *Held,* even though the personal liability on the earlier mortgage had become barred, it was a valid antecedent debt binding on the sons.

*Arumugam Chetty* v. *Muthu Goundan,* (1919) 42 M 711 : *Gouri Shankar Singh* v. *Sheonandan Misra* (1923) 46 All 384.

Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore, dated 13th December, 1923, in O. S. No. 93 of 1922.

*A Krishnaswami Aiyar* and *V. Govindarajachari* for appellants.

*N. Rama Rao* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal against a decree on a mortgage executed by the 1st defendant, father of defendants 2 to 5. The mortgage was executed in order to discharge a prior mortgage deed executed by the 1st defendant in 1906, Ex. B, the suit mortgage being (Ex. A), dated 10th October, 1915. The Subordinate Judge has given a decree holding that the mortgage, having been executed to discharge an antecedent debt of the father, is binding upon the sons' shares, and he relies on the Full Bench decision of this Court in *Arumugam Chetty* v. *Muthu Goundan* (1).

For the appellants it is contended that the decision is not applicable, because in the present case a portion of the previous debt could only be enforced as a mortgage debt and not as a personal debt of the father. This question has not been considered in the Lower Court and it is not at all clear whether the personal liability is barred or not in respect of the first three instalments. Whether it is barred or not, however, the case can be disposed of on another ground. It has

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*Appeal No. 184 of 1924. 24th September, 1925.

1. (1919) I L R 42 M 711 : 37 M L J 166 (F B).

Satya-narayana v. Satyanarayanamurthi.

definitely been held in *Gauri Shankar Singh* v. *Sheonandan Misra* (2) that a mortgage debt, whether the personal liability is barred or not, is an antecedent debt binding on the sons' shares. This same principle has been adopted in *Arumugam Chetty* v. *Muthu Goundan* (1), and although it may be said that in that case the personal liability had not been barred and that therefore the decision is not strictly in point, yet in view of the form of the questions propounded by the Referring Bench it is clear from the judgment that the first of the questions was dealt with as a general question, and in effect the decision of the Full Bench is that any prior mortgage debt due by the father is valid as an antecedent debt, and this decision is not qualified by an expression of opinion that the mortgage debt must also be enforceable as a personal liability.

We therefore follow these two cases and dismiss the appeal with costs.

Time for redemption is extended to three months from this date.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Mulugu Chengayya ... *Appellant** (*Appellant in S. A. No.* 895 *of* 1921 *on the file of the High Court—Plaintiff*)

*v.*

Aruvela Devasanamba Garu and others ... *Respondents* (*Respondents* 1 *to* 4 *and* 6 *to* 8 *in do—Defendants* 1 *to* 4, 6 *and L. Rs. of* 5*th defendant*).

Chengayya v. Devasanamba Garu.

*Hindu Law—Joint family—Manager* de facto*—Sale of joint family property by—Shares of other members if pass under—Presumption proper in such cases.*

The plaintiff and the 6th defendant were brothers, the 6th defendant being the elder brother and *de facto* manager of the family. The 6th defendant sold the suit property, which was joint family property, to the 1st defendant under two sale deeds. The debt for which the sales were effected was one binding both upon the plaintiff and upon the 6th defendant. There was no mention in the sale deeds that the sale by the 6th defendant was in his capacity of manager of the joint family of himself and the plaintiff. Neither did the sale deeds mention that the sale by the 6th defendant was of his right only.

On a question arising as to whether the plaintiff's share in the suit property also passed under the said sale deeds, the evidence was to the effect that

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*L P Appeal No. 90 of 1924. 9th October, 1925.

1. (1919) I L R 42 M 711 : 37 M L J 166 (F B). 2. (1924) I L R 46 All 384.

Chengayya *v.* Devasanamba Garu.

it was believed at the time of the sales that the plaintiff had been adopted into another family. There was, however, no evidence that at that time the 6th defendant either denied the right of the plaintiff or held himself out as the only person interested in the property.

*Held,* that the plaintiff's share in the suit property also passed under the said sale deeds.

Presumption proper in case of purchase from *de facto* manager of joint Hindu family of joint family property.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Krishnan, dated 12th March, 1924, passed in S. A. No. 895 of 1921 preferred against the decree of the Court of the Subordinate Judge of Chittoor in A. S. Nos. 46 and 47 of 1920 preferred against the decree of the Court of the District Munsif of Tirupati in O. S. No. 1016 of 1914.

*B. Somayya* for appellant.

*N. Chandrasekhara Aiyar* and *S. Kumaraswamiah* for respondents.

The Court delivered the following

JUDGMENT :—The question in this appeal is whether the plaintiff's share was sold by the 6th defendant to the 1st defendant under sale deeds, Exs. VII and III. The contention of Mr. Somayya for the appellant is that the 6th defendant sold the property as his and that he did not sell the property as the manager of the joint Hindu family and therefore he could not have validly conveyed the share of the plaintiff. He places great reliance upon the evidence of P. W. 3, the son of the 1st defendant. In his evidence he stated that it was believed at the time of the sale that the plaintiff had been adopted into another family. From this the appellant wants us to infer that the 6th defendant sold only his share of the family property. The circumstances are these :—The plaintiff and the 6th defendant are brothers. The property of the family was sold for paying off the debts of their father and in the documents there is no mention that the right of the 6th defendant alone was sold. No doubt there is no mention in it that the 1st defendant conveyed the properties under Exs. VII and III as managing member of the joint Hindu family. But the question is, where the *de facto* manager of a joint Hindu family conveys the property without any reservation and without restricting the right conveyed to his own share, whether the Court should presume that the vendee contracts to buy and the vendor contracted to sell the interest of the whole family in the property. The proper presumption in such a case would be that where a vendee purchases property

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from a *de facto* manager of the joint Hindu family and there is nothing in the document to show that the manager conveys only his share or that he reserves the share of anybody from being conveyed both the parties to the conveyance intended that the whole interest of the family should be conveyed by it. Here in this case there is an additional circumstance that the debt for which the sales were effected was a debt binding both upon the plaintiff and upon the 6th defendant. The purpose being one which could bind both the plaintiff and the 6th defendant; the mere fact that the vendee did not describe himself as the managing member of the joint Hindu family is not a circumstance which should be taken as militating against the presumption that what the *bona fide* purchaser bought was the whole interest of the joint family in the property conveyed to him.

Mr. Somayya places great reliance upon *Balwant Singh* v. *R. Clancy* (1). The facts of that case are different from those of the present. In that case the vendor claimed the property as impartible property belonging to himself alone. It was held that he could not have intended to convey the interest of the younger brother whose right he denied in the document itself. Their Lordships of the Privy Council found that the brother was a minor at the time and therefore his consent to the sale was of no avail to the vendee. They also found that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh. Here when the 6th defendant conveyed the property, he did not deny the right of the plaintiff, nor did he hold out that he was the only person interested in the property. The case in *Ammani Ammal* v. *Ramaswami Naidu* (2) does not help the appellant. It is unnecessary to consider the cases quoted by Mr. Chandrasekhara Aiyar such as *Maharaj Singh* v. *Balwant Singh* (3), *Surapa Raju* v. *Venkayya* (4) and *Audimula Mudali* v. *Alamelu Ammal* (5) in the view we have taken of the case. We consider the judgment of the learned Judge to be correct and dismiss the Letters Patent Appeal with costs, two sets, one to the 1st defendant and the other to the 5th defendant's legal representatives.

A. S. V. *L. P. Appeal dismissed.*

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1. (1912) I L R 34 All 296 at 298.
2. (1919) 10 L W 75.
3. (1906) I L R 28 All 508 at 517.
4. (1915) M W N 908.
5. (1916) 4 L W 126.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Kanuri Venkata Siva Rao and others ... *Petitioners** (*Counter-Petitioners—Defts.*)

*v.*

Chittoori Rama Kristnayya ... *Respondent* (*Petitioner-Plaintiff.*)

Venkata Siva Rao *v.* Rama Kristnayya.

*Madras Village Courts Act (I of 1899 as amended by Act II of 1920), S. 78 —Rules framed under Rr. 18 and 64—If* ultra vires—*Civil suit challenging validity of election—If lies—Temporary injunction—Power to grant.*

A suit was filed in a Civil Court for a declaration that the election of the defendants as members of a Panchayat Court under the Madras Village Courts Act was void and pending the trial of the suit a temporary injunction was asked for, restraining them from entering upon their duties as *panchayatdars. Held,* (1) that it was neither necessary nor desirable that such an injunction should be passed, as under R. 64 framed by the Government under the Act all proceedings of the Panchayat Court would be valid despite defects in their constitution or in the qualifications of their members; (2) the only way in which such elections could be challenged was by application to the Revenue Divisional Officer under R. 18 (*a*). The orders passed thereon by the Revenue Divisional Officer or the Collector would be final and not liable to be contested by suit or otherwise; and (3) the rules framed under S. 78 were not *ultra vires.*

When a public body has been created by a statute and that statute empowers Government to frame rules for its working, it is open to Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the statute and thereby to exclude the jurisdiction of the ordinary Civil Courts. *Kona Thimma Reddi* v. *The Secretary of State for India in Council,* (1923) I L R 47 M 325 and *Bhaishankar Nanabhai* v. *The Municipal Corporation of Bombay,* (1907) I L R 31 Bom 604 followed.

Revision Petition to revise the order of the Court of the District Munsif of Bezwada in I. A. No. 208 of 1924 in O. S. No. 98 of 1924.

*L. A. Govindaraghava Aiyar* and *P. Satyanarayana Rao* for petitioners.

*V. Ramadoss* and *C. Ramakrishnayya* for respondent.

The Court delivered the following

JUDGMENT :—This revision petition arises out of a suit filed in the Court of the District Munsif, Bezwada. The object of the suit was to obtain a declaration that the election of the defendants as members of the Panchayat Court of Bezwada was void. Pending the trial of the suit, the plaintiff applied for a temporary injunction restraining the defendants from entering upon their duties as Panchayatdars. The District Munsif decided that he had jurisdiction to entertain

*C R P No. 482 of 1924 and A A O No. 373 of 1924. 5th October, 1925.

Venkata Siva Rao *v.* Rama Kristnayya.

the suit and proceeded to grant the injunction applied for. The result—but for the interference of this Court—might have been to deprive the citizens of Bezwada for several years of the services of a Panchayat Court. R. 64 of the rules framed by Government under the Village Courts Act provides fully for the competency of the proceedings of Panchayat Courts despite defects in their constitution or in the qualifications of their members. So that it was as unnecessary as it was undesirable for the Munsif to have passed the order he did.

Apart from that, we are of opinion that he had no jurisdiction to entertain the suit. Rules have been framed by Government under the Act to regulate the election of Panchayatdars. R. 18 (*a*) lays down that objections to an election shall be made within 7 days after the election to the Revenue Divisional Officer, who shall enquire, and except in certain cases which are to be referred to the Collector, pass orders. Sub-section (*b*) declares that the orders of the Revenue Divisional Officer and the Collector respectively shall be final and not liable to be contested by suit or otherwise. It does not appear that the plaintiff made any attempt to comply with these rules. Instead of doing so, he has resorted to a method of contesting the election, which has been expressly excluded by the rules. The law on the subject has been stated in *Kona Thimma Reddi* v. *The Secretary of State for India in Council* (1), to which decision one of us was a party. It is this, that when a public body has been created by a statute and that statute empowers Government to frame rules for its working, it is open to Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the statute and thereby to exclude the jurisdiction of the ordinary Civil Courts. The same principle is laid down in *Bhaishankar Nanabhai* v. *The Municipal Corporation of Bombay and others* (2): "Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of the Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any."

1. (1923) I L R 47 M 325: 46 M L J 60.
2. (1907) I L R 31 Bom 604.

Venkata Siva Rao v. Rama Kristnayya.

In this case, the jurisdiction of the Courts has been excluded by express words.

It is, of course, argued that the rules framed under S. 78 of the Act are *ultra vires*. That section empowers the Governor in Council to make rules to "regulate the appointments or elections of Presidents and other members of the Panchayat Courts." It is, we think, a necessary part of this power of regulation that Government should appoint a tribunal to enquire into and decide objections to such elections.

The Revision Petition is allowed with costs throughout.

T. S. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE REILLY.

Manepalli Satyanarayanamurthi ... *Appellant* in Appeal No.* 141 *of* 1923 *and respondent in Appeal No.* 195 *of* 1923 (*Defendant*)

*v.*

Thommandra Erikalappa ... *Respondent in Appeal No.* 141 *of* 1923 *and appellant in Appeal No.* 195 *of* 1923 (*Plaintiff*).

Satyanarayanamurthi v. Erikalappa.

*Contract—Sale of goods—Deposit made with seller—Buyer refusing to take delivery—Suit for damages—Defence that seller had no goods to deliver—Liability to pay interest on excess amount over and above damages.*

Where a buyer of goods commits a breach of the contract of sale by not taking delivery at the time fixed in spite of reminders from the seller, a suit by the latter for damages is not to be defeated merely by its being shown that after repudiation by the buyer, he had not the goods to implement the contract actually in his physical possession. The seller can show that he could supply the goods contracted for either from the open market or from any other source. *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Co., Ltd., and others* (1923) A C 48 followed.

In mercantile contracts, where the buyer has deposited a sum of money with the seller, the latter is not entitled to keep the same on a breach by the former; but only to damages. If the amount of damages finally awarded to him is less than the deposit amount, he is liable to pay interest on the difference.

Appeals against the decree of the Court of the Subordinate Judge of Kistna at Ellore in O. S. No. 145 of 1921.

*S. Varadachari* and *V. S. Narasimhachari* for appellant in Appeal No. 141 of 1923.

*M. Patanjali Sastri* and *B. Somayya* for respondent in Appeal No. 141 of 1923.

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*Appeals Nos. 141 and 195 of 1923. 23rd September, 1925.

*M. Patanjali Sastri* and *B. Somayya* for appellant in Appeal No. 195 of 1923.

*S. Varadachari* and *V. S. Narasimhachari* for respondent in Appeal No. 195 of 1923.

The Court delivered the following

Coutts Trotter, C.J.

JUDGMENTS :—*The Chief Justice* :—This case is really governed by the decision of the House of Lords in *British and Beningtons, Ltd. v. N. W. Cachar Tea Co., Ltd., and others* (1). As I understand that case, it lays down that a seller is not to be defeated merely by its being shown that after repudiation by the buyer he had not the goods to implement the contract actually in his physical possession. He can show that he could supply the goods contracted for either from the open market or from any other source and he would be entitled to maintain a suit for damages for wrongful repudiation.

In this case the contract was that the buyer should take the goods between the 20th and 30th of April, 1919. He did not do so and he set up a false defence that he sent two men to take delivery within the contract period. Those two men were called and gave evidence and the learned Judges refused to believe them. No Judge sitting as a jury would have believed them because the seller wrote on 28th April, 1919, reminding the buyer that the date of effluxion of the contract was drawing near and the buyer (plaintiff) did not answer that until as late as 6th May, 1919, when he set up this lying story about the two men having gone for the rice and being sent empty away. Now a point has been taken in this Court by Mr. Patanjali Sastri which is certainly ingenious, and it is this, that on the evidence before the Court which we have in the form of depositions it was never proved by the seller that the goods he had were goods which corresponded to the description of the goods to be sold, it being common knowledge of course that there are different brands and different qualities of rice, and indeed different qualities were mentioned at the trial. Two witnesses were asked whether they knew what sort of rice it was that the defendant proved to the learned Judge that he had at Ellore, and they spoke of some rice in somebody's godown and of some more that he could have got delivery of against cash from the Bank. Of course the people who were asked those questions replied—there is no doubt that the vakil knew that they would reply—that they did not know. But unfortunately there is

1. (1923) A.C 48.

Satyanarayanamurthi v. Eiikalappa.

Coutts Trotter, C.J.

not a trace of that suggestion as to the quality not being right having been put to the defendant himself; the seller, who knew all about it. We are not to forget that the buyer's case at the trial was that he was entitled to have damages because he had asked for delivery and had not got it. In my opinion it would be quite wrong to act on a suggestion of this kind when it is clear that the defendant was never given a fair chance of explaining it at the trial.

The buyer's appeal (A. S. No. 195 of 1923) will therefore be dismissed with costs.

With regard to the seller's appeal (A. S. No. 141 of 1923) he says first that, having got a deposit and there having been failure by the buyer to take delivery, he ought to keep the deposit. His own original suggestion was that he should return the deposit less whatever he is entitled to by way of damages. I can content myself with saying that it is never the practice in mercantile contracts, to hold that whatever be the damage suffered or not suffered the seller is to be entitled to keep the deposit. He is only entitled to such damages as the learned Judge sitting as a jury has suggested, namely, 12 annas a bag, and I do not think we ought to interfere in a matter which is eminently one for the Trial Judge.

With regard to interest, it sounds plausible to say, as Mr. Varadachari has argued, that a person who is in default cannot possibly be heard to say that he is entitled to claim interest from the other side. The answer to it is the one that the learned Judge has given, namely, that the seller should have made calculation of the damage he has actually suffered and tendered the return of the balance to the buyer. No doubt it puts a man in a difficulty and if he goes ultimately into a Court of Law he might have to justify his fixing the figure as best he could. But I take it that almost any tribunal would have an indulgent eye on the arithmetic of a man who adopted that straightforward course. In the result the seller had the buyer's money in his hands for a good many years to the amount of the excess between what the Judge has allowed by way of damages and the amount of the deposit which was Rs. 4,001. I think here too the judgment of the learned Judge must be upheld, and this appeal also will be dismissed with costs.

*Reilly, J.*:—I agree.

T. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Parakkat Devaswom Trustee, K. P. Veeraraghava Aiyar and others ... *Appellants** (*Respondents* 10 *and* 12 *and supplemental appellants*)

*v.*

Venkatachellam Vadhyar and others ... *Respondents* (*Petitioners* 1 *and* 2 *and respondents* 2 *to* 7, 9 *and* 12).

Parakkat Devaswom *v.* Venkatachellam Vadhyar.

*Trustee—Removal—Decree for—Operation of—Date of—Date of decree or date when trustee is ousted from control of trust property—Decree obtained against trustee after decree for his removal but before actual removal—Validity—Execution petition filed against him between those dates—If one in accordance with law—Step-in-aid—Execution petition against wrong judgment-debtors if and when a—Execution of decree against trust—Objection that decree was fraudulent—Maintainability.*

A suit was instituted on a hypothecation bond executed by certain persons as trustees or owners of a certain devaswom. Pending that suit another suit was instituted to declare that the trust was a public trust and to remove the above persons. In the latter suit a decree to remove them was passed on 9th July, 1914. The final decree in the hypothecation suit was passed on 30th September, 1914.

It was contended that the decree in the hypothecation suit was a nullity because the decree removing the original trustees had been passed some two months before. There was, however, nothing to show that, before the date of the decree in the hypothecation suit, the original trustees had, as a matter of fact, been removed in pursuance of the decree directing their removal, and that some other trustees or a receiver had been appointed in their place who could have been brought on the record as the legal representatives of the original trustees.

*Held,* that the decree in the hypothecation suit was not a nullity.

The removal of the original trustees came into operation, not from the date of the decree removing them, but from the date on which they were removed from actual possession.

*Held further,* that till the original trustees were ousted from the control of the trust property they were the proper judgment-debtors to be brought on the record in a petition to execute the final decree in the hypothecation suit.

An execution petition filed against the wrong judgment-debtors will not be invalid as a step-in-aid so long as the executing decree-holders *bona fide* believe that they are still the proper judgment-debtors.

The objection that a decree obtained against the trustees of a trust was a fraudulent decree come to by collusion between them and the decree-holder cannot be taken in execution.

Appeal against the appellate order of the District Court of South Malabar in A. S. No. 523 of 1922 preferred against the order of the Court of the Subordinate Judge of Ottapalam in E. P. No. 123 of 1922.

* A. A. A. O. No. 102 of 1923. 27th February, 1925.

Parakkat Devaswom v. Venkatachellam Vadhyar.

*K. Kuttikrishna Menon* for appellants.

*N. A. Krishna Aiyar* and *T. S. Anantaraman* for respondents.

The Court delivered the following

JUDGMENT :—The question in this appeal is whether the execution petition is barred by time. The decree sought to be executed is the final decree in O. S. No. 36 of 1912 on a hypothecation bond executed by certain persons. The bond was executed by them as trustees or owners of a certain devaswom. At the time that suit was pending, another suit, O. S. No. 12 of 1912, to declare that the trust was a public trust and to remove the above persons was going on. On 9th July, 1914, a decree to remove them was passed. The final decree in O. S. No. 36 of 1912, the hypothecation decree against the property, was passed on 30th September, 1914. Three execution petitions were put in to execute this final decree. The first was put in on 20th July, 1915, and was dismissed, because batta was not paid. The second was put in on 26th June, 1918, and was rejected for the same reason. The third was put in on 20th June, 1921, and is the execution petition now under appeal.

The appellants are the present trustees who were put into office in the place of the original judgment-debtors by force of the decree in O. S. No. 12 of 1912 at some time which is not known. They contend *in limine* that the decree in O. S. No. 36 of 1912 now under execution was not against the trust property at all ; but I am not prepared to accept this contention for the decree clearly is, in the first instance, against the trust property. It is further contended that the decree is a nullity, it being pointed out that the decree removing the original trustees was passed some two months before the final decree against them. But it is clear that this contention cannot arise unless the respondents show that the judgment-debtors in O. S. No. 36 of 1912 had been, as a matter of fact, removed, in consequence of the decree in O. S. No. 12 of 1912, some time prior to the final decree in O. S. No. 36 of 1912 and that some other trustees or Receiver had been appointed in their place who could have been brought on the record as the legal representatives of the original trustees before the final decree was passed. This fact the appellants have not attempted to show. It is a question of fact which ought to have been heard and decided by the first Court ; and in the absence of

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any evidence to prove that fact it cannot be reasonably contended that the decree in O. S. No. 36 of 1912 is a nullity.

The next contention is based on very much the same argument. Appellants contend that the execution petition, dated 20th July, 1915, was not in accordance with law, because the proper judgment-debtors were not on record in that petition because as that petition was put in against the judgment-debtors named in the decree a year or so after the decree for their removal had been passed. It is said that a Receiver was appointed in O. S. No. 12 of 1912 on 16th February, 1915, some five months before the date of the first execution petition; but again, the appellants have not attempted to show that this Receiver took charge or that the trustees, who were the original judgment-debtors, were actually ousted by him from the property prior to the date of this first execution petition.

The Lower Appellate Court accepts the view that the original judgment-debtors were not the proper party-respondents to the execution petition because they had been dismissed by the decree in O. S. No. 12 of 1912 on the 9th July, 1914; but it is nevertheless held that the execution petition was in accordance with law. I do not agree with the Lower Appellate Court in its view that the removal of the original trustees came into operation from the date of the decree and not from the date, whatever date it be, on which the trustees were removed from actual possession. So long as they were not removed and they remained in control of the property it cannot be contended that they were not proper judgment-debtors to be on record in the execution petition. Suppose, for example, that no Receiver or new trustee was appointed for some months after the passing of the decree in O. S. No. 12 of 1912. It could not be held that there was no judgment-debtor at all against whom any execution petition could be brought and that therefore no execution petition could be brought during that period. The crucial date on which the trustees cease to be actual judgment-debtors is that on which they were ousted from the control of the trust property. What that date is does not appear. It is clear that the duty of the appellants was to establish that date and they have not chosen to do so. It cannot, therefore, be concluded that on the date of the execution petition of 1915 the original trustees were not the proper judgment-debtors. Therefore there is no proof that this execution petition was not against the proper judgment-debtors.

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Even if it were against the wrong judgment-debtors, it would not be invalid as a step-in-aid so long as the executing decree-holders *bona fide* believed that they were still the proper judgment-debtors. According to law, so far as laid down in this Presidency, a *bona fide* application to execute a decree against a particular judgment-debtor is in accordance with law even though it is subsequently discovered that the judgment-debtor was dead at the time of the application. [See *Samia Pillai* v. *Chockalinga Chettiar* (1)]. An unreported case of this Court, C. M. A. No. 185 of 1902, has been brought to my notice which takes an opposite view. But in such cases the proper course is to follow the reported decision. The same principle has been laid down in *Balkishen Das* v. *Bedmati Koer* (2), where it was held that an application made against persons who were not the legal representatives of the deceased judgment-debtor was valid if the decree-holder *bona fide* believed that they were the legal representatives. [See also *Ramaswami Chettiar* v. *Oppilamani Chetti* (3)]. The High Court of Allahabad takes a different view which this High Court so far has not accepted. [see *Gyanendra Nath Basu* v. *Rani Nihalo Bibi* (4) ; but compare with this *Muhammad Husain* v. *Inayat Husain* (5)].

Now as the application of 1915 was put in against the judgment-debtors named in the decree the executing Court, in the absence of evidence to the contrary, could not but decide that the execution petition was in accordance with law. It is not its business to go outside the decree and enquire whether the judgment-debtors named in that decree were still the proper judgment-debtors in 1915. The presumption is that the execution petition was in accordance with law, and it was admitted as such by the Court and notice issued thereon. The parties who now wish to contend that it was not were bound to prove it ; and for that purpose they must first establish that the judgment-debtors named in the decree were no longer the real judgment-debtors. That, as noted, they have not attempted to do. Unless and until they prove that fact, it was not the business of the decree-holders to prove that they nevertheless *bona fide* believed that the judgment-debtors named in the decree were still really the judgment-debtors. It is not, therefore, open to the appellants who have not

1. (1893) I L R 17 M 76 : 4 M L J 8.
2. (1892) I L R 20 C 388 at 396.
3. (1909) I L R 33 M 6 : 19 M L J 671.
4. (1910) I L R 32 A 404.
5. (1914) I L R 36 A 482.

established the fact necessary to throw on the decree-holders the onus of proving their *bona fide* to put forward now any contention that the execution petition of 1915 was not *bona fide*.

A further contention has been put forward that the decree under execution was a fraudulent decree come to by collusion between the mortgagee and the original trustees. But obviously that objection cannot be taken in execution. The real judgment-debtor is the trust; and the representative of the trust cannot attack it in execution proceedings. If they want to set aside the decree they must institute appropriate proceedings.

I am, therefore, of the opinion that the order of the District Judge is right and dismiss this appeal with costs of respondents 1 and 2.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE BEASLEY.

Rathan Singh ... *Appellant** (*Petitioner*)

*v.*

The Commissioner of Income-tax to the Government of Madras ... *Respondent* (*Respondent*)

Rathan Singh *v.* Commissioner of Income-tax.

*Income-tax Act (XI of 1922), S. 10 (2) (vi), (vii), (ix)—Construction of—Heads of relief to be read disjunctively—Obsolete—Meaning of—Motor car meeting with accident and sold as scrap iron—If obsolete—Old car purchased for using parts—Deduction under S. 10 (2) (ix).*

In respect of a new motor car which met with an accident and having been broken to pieces had to be sold as scrap iron, the owner is not entitled to claim a deduction under S. 10 (2) (*vii*) of the Income-tax Act. "Obsolete" machinery, under the sub-clause, means machinery which though it is able to perform its function has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man instead of continuing to use such machinery would discard it and instal more modern and more labour-saving machines.

The separate heads of relief by way of deductions specified in S. 10 (2) must be treated as disjunctive and cumulative and not as alternative and exclusive. Nor can the general provision in S. 10 (2) (*vi*) be construed as extinguishing the right to deductions which are specifically outlined and defined in the other sub-sections.

A person who owned a number of motor cars plying for hire purchased an old car for the sole purpose of using bits and parts of it for carrying out repairs to his other cars. He claimed the amount of purchase money as a deduction under S. 10 (2) (*ix*). *Held,* his claim must stand on the same footing as if he had obtained and used new parts for repairing his fleet of cars from time to time and fell within S. 10 (2) (*ix*).

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*O S Appeal No. 15 of 1925. 8th September, 1925.

Rathan Singh v. Commissioner of Income-tax.

On Appeal from the order of the Hon'ble Mr. Justice Kumaraswami Sastri, dated 13th August, 1924, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in the matter of S. 45 of the Specific Relief Act, S. 66 of the Income-tax Act and of Rathan Singh Motor Service.

*K. V. Sesha Aiyangar* for appellant.

*M. Patanjali Sastri* for respondent.

The Court delivered the following

JUDGMENT :—This reference raises two points. The assessee's business is that of an owner of motor-cars plying for hire. Only two points were raised before the learned Judge, though the first was raised under two heads. We propose first to dispose of the second contention.

The assessee was the owner of a new car which very shortly after it was purchased met with an accident and had to be sold as scrap iron and the learned Judge has held that this entitles him to claim a deduction under S. 10 (2) (*vii*) of the Indian Income-tax Act of 1922 on the footing that this may be treated as having become in the words of the Act obsolete. It seems to us that this is contrary to the plain meaning of the language used. Obsolete machinery means machinery which though it is able to perform its function has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man instead of continuing to use such machinery would discard it and instal more modern and more labour-saving machines. In our opinion, the word obsolete is quite inapplicable to a new car which is only useless for its purposes because it has been broken to pieces in an accident and in our opinion this cannot be allowed as a deduction and we disagree with the learned Judge.

A much more difficult point is raised with regard to the second matter which relates to certain items which were disallowed by the Income-tax authorities as being of the nature of capital expenditure which is excluded from deduction by S. 10 (2) (*ix*). That sub-section allows any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the profits or gains of the business. The latter comes to a total of Rs. 3,296-2-2 and it seems reasonably clear that the first three items were additions to the machinery and plant used by the firm, which can clearly be classed under the head of capital expenditure. The largest item is one of Rs. 1,925 which is described as the cost of an old car purchased

from Tirali Srinivasa Aiyangar. The evidence of the assessee about that, which seems to have been accepted, is that he bought the car not to use it as a car but to resolve it into its component elements and use the parts for casual repairs to his existing fleet of cars. The remaining items are for the renewal of various parts of the cars actually engaged in the business of the assessee.

The Income-tax authorities rely upon a decision in Scotland under the statute in vogue at the time, *viz.*, S. 12 of the Customs and Inland Revenue Act of 1878, 41 Vic. c 15. That section directs the Commissioners in assessing the profits and gains of a trade to allow such deductions as they may think just and reasonable to represent the diminished value by reason of wear and tear during the year of any machinery or appliances used for the purpose of the concern and belonging to the person or company by whom the concern is carried on. Upon that it was held in the case of *The Caledonian Railway Co.* v. *Banks* (1) decided in the Court of Exchequer in Scotland that the assessee could not deduct the actual expenses of occasional repairs and renewals and then proceed to claim an additional deduction under the general section of the statute for the same thing under the guise of wear and tear. With that decision no one wishes to quarrel, but it is argued for the assessee that the position under the Indian Statute is quite different because the sections relating to deductions and the sub-sections allowing deductions must be taken to be disjunctive, and it is not an answer to a claim which clearly falls within the words of any one of the sub-sections to say to the assessee that he must be deemed to have obtained that deduction under some other sub-section. Deductions are allowed such as are material for the decision of this case under S. 10 (2) *v, vi* and *ix*. Cl. (*v*) allows a deduction in respect of current repairs to buildings, machinery, plant or furniture, the deduction permitted being the amount paid on account thereof. It is said in this case that the renewal of parts of a machine cannot be treated as a current repair but must be treated as a new addition of capital to enable the machine to be kept in proper running order. It is pointed out that by cl. (*vi*) of sub-section (2) a deduction is allowed in respect of depreciation which has been assessed by Government at the not ungenerous figure of 20 per cent. and it is said that the assessee having had the benefit of this large deduction

1. 1 Tax Cases 487.

under cl. (*vi*) cannot get the same deduction over again in another form by having recourse to cl. (*v*). In our opinion, if the Legislature meant the various reliefs by way of deductions specified in S. 10 of the Act to be alternative and exclusive they could very easily have said so and in our opinion if any deduction claimed falls within the express words of any one of the sub-sections it is not open to Government to say that it is really covered by the general provision of sub-section (*vi*). It is obviously arguable that most of the repairs in this case can be described as current repairs though of course the matter is one of degree. If a carburetter of a motor-car ceases to function, we should incline to the view that the renewal of the carburetter in order to enable the car to keep the road is properly described as a running repair. On the other hand, if a car as a result of an accident had nothing left but a wheel and everything else had to be renewed, clearly the sensible view would be that the renewal of the car could only be described as an increase of capital. But apart from that, we have the provision of sub-section (2) (*ix*) which speaks in general terms of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. Without committing ourselves to a view as to what are current repairs within the meaning of cl. (*v*) we think it reasonably clear that the cost of repairs set forth in the list that was handed up to us must be treated as an expenditure incurred for the purpose of earning the profits or gains of the business and we do not think that it can properly be treated as capital expenditure which is excluded from the operation of cl. (*ix*). If this view be correct, the cost of an old car for the sole purpose of using bits and parts of it for carrying out repairs to cars on the road which is the main item in the assessee's claim for deductions being nearly two-thirds of the whole, stands on the same footing as if he had obtained and used new parts for repairing his fleet of motor-cars from time to time. In this case we feel that the Legislature has done that which is so often done in Indians Acts and that by enumerating too much and trying to cover every possible case, they have *per incuriam* given more than one remedy in respect of what is really one ground of deduction. But until and unless the Act is amended, we think that separate heads of reliefs must be treated as disjunctive and cumulative and hold that the deductions claimed except as regards the first three items fall within the express words of S. 10(2) (*ix*) and that the Scottish case is inapplicable in India because the Act which the Scottish case interprets was

an Act which only contained deductions for depreciation and did not like the Indian Act specify under separate heads other deductions differently described. We do not think it would be right to hold that what I may call the omnibus clause (cl. *vi*) can be construed as extinguishing the right to deductions which are specifically outlined and defined in other sub-sections of the Act. We feel the result to be unsatisfactory and to be one which gives more to the assessee than was intended or indeed is just ; but the fault is that of the draftsman of the Indian Act, who threw into the section the omnibus clause modelled on S. 12 of 41 Vic. c. 15 without reflecting that such a clause was not wanted in an Act which contained the specific deductions taken from the later English Finance Acts. The result will be that the appeal is allowed with costs. On the reference, there will be judgment for the Commissioner with costs to be fixed at Rs. 150.

T. S. V. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Rajagopala Pandarathar and two others ... *Appellants* (1st defendant-petitioner and two others)*

*v.*

Tirupathia Pillai and another ... *Respondents (Respondents—Assignee decree-holders).*



*Civil Procedure Code, S. 21—Mortgage—Decree for sale—Sale in execution of—Validity—Transfer of territorial jurisdiction subsequent to filing of execution application—Sale by Court which passed decree subsequent to—Jurisdiction—Ss. 37 to 39—Objection to sale by such Court on ground of want of jurisdiction—Maintainability—Objection not raised before—Effect—Territorial jurisdiction—Rule as to—Applicability to mortgage decrees—S. 24, Civil Procedure Code—Transfer under—Power of—Scope of.*

In a suit for sale on a mortgage instituted in the Sub Court of Tanjore, that Court passed a decree absolute for sale, and the decree-holder filed an application for the execution of that decree. After the execution application was filed, the taluk where the suit property was situate was by a Government notification transferred from the local limits of the Sub-Court of Tanjore to the jurisdiction of the District Court of West Tanjore. Notwithstanding that notification the Sub-Court proceeded with the hearing of the execution application, and made an order overruling several objections raised by the judgment-debtor, that relating to the want of jurisdiction not being, however, one of them. To get over any possible plea of want of jurisdiction, the decree-holder applied to the District Court of West Tanjore to withdraw the execution

*A A O No. 450 of 1924. 28th August, 1925.

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application to its own file, and that Court formally withdrew the application to its file and re-transferred it to the Sub-Court of Tanjore. After this order of re-transfer, without any objection being taken to jurisdiction, the Sub-Court made an order directing the sale of the mortgaged property, and it was accordingly sold and was purchased by the decree-holder himself.

On an application made by the judgment-debtor under O. 21, R. 90, Civil Procedure Code, for the setting aside of the sale on the ground that by virtue of the Government notification the Sub-Court of Tanjore had no jurisdiction to sell the property, *held*, that having failed to take the objection of want of jurisdiction at the earliest opportunity, the judgment-debtor was, on the principle underlying S. 21, Civil Procedure Code, precluded from attacking the sale on that ground.

*Per Venkatasubba Rao, J.*:—The rule of territorial jurisdiction does not apply to execution of mortgage decrees. In the case of a mortgage decree the Court which passed it may, notwithstanding the fact that the property is outside its jurisdiction, bring it to sale.

S. 24 of Civil Procedure Code applies to execution proceedings. In regard to suits competency is not referred to in the section in the sense of territorial or local competency.

The Courts to which execution proceedings can be transferred under S. 24, Civil Procedure Code, are not merely those mentioned in S. 39, Civil Procedure Code.

*Quaere.*—Whether on the right construction of Ss. 37 to 39, Civil Procedure Code, the Court which passed the decree and that which has jurisdiction owing to territorial re-distribution have jurisdiction to execute the decree.

Appeal against the order of the Court of the Subordinate Judge of Tanjore, dated 22nd September, 1924, in E. A. No. 564 of 1923 in E. P. No. 212 of 1923 in O. S. No. 43 of 1911.

*S. Varadachariar* and *K. S. Champakesa Aiyangar* for appellants.

*The Advocate-General, T. M. Krishnaswami Aiyar* and *N. Sivaramakrishna Aiyar* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—The question argued in this case is one of jurisdiction, and it has been argued ably by Mr. Varadachariar for the appellants and the Advocate-General for the respondents.

The suit is upon a mortgage and the final decree was passed by the Sub-Court of Tanjore on 23rd March, 1917. The execution application with which we are concerned was filed in that Court on 2nd August, 1922. On 1st April, 1923, the taluk where the property is situate was by a Government notification transferred as and from 1st July, 1923, from the local limits of the Sub-Court of Tanjore to the jurisdiction of the District Court of West Tanjore. Notwithstanding this

notification the Sub-Court proceeded with the hearing of the execution application. On 6th July, 1923, objections were taken to the sale proclamation but no objection on the ground of want of jurisdiction was raised. On 14th July, 1923, the Sub-Court made an order in regard to the objections raised. The decree-holder by this time having realised that the District Court of West Tanjore was the proper Court applied to that Court to withdraw to its own file the execution application. The District Court in its turn formally withdrew the application to its file and re-transferred it to the Sub-Court believing that by this process it conferred jurisdiction on the Sub-Court. After this order of re-transfer, without any objection being taken to jurisdiction, the Sub-Court made an order directing the sale of the property. On 22nd October, 1923, the decree-holder himself purchased the property for Rs. 41,000, the amount due to him being over Rs. 52,000, and thereupon the defendant, under O. 21, R. 90, Code of Civil Procedure, applied to the Sub-Court for the setting aside of the sale and one of the main objections taken was in regard to the jurisdiction of the Court to sell the property. The learned Subordinate Judge disallowed this application, and in the present appeal the correctness of his order is attacked.

I may at the outset observe that though the sale is impeached before us on several grounds, the only point seriously urged is the one relating to jurisdiction.

On three grounds the order of the Lower Court may be supported.

First, the defendant did not object to the jurisdiction of the Court, and on the principle underlying S. 21, the objection must be deemed to have been waived. It is a settled principle that where a Court has no inherent jurisdiction over the subject-matter of a suit, no waiver on the part of the defendant can confer jurisdiction upon it. But where the Court has jurisdiction over the subject-matter but there are irregularities in the initial procedure, the defendant who without objection goes to trial upon the merits cannot subsequently dispute the jurisdiction of the Court. [See *Ledgard* v. *Bull* (1)]. Here then is the rule as well as the exception. Turning to the Indian Statute Law, S. 99, Civil Procedure Code, embodies the rule. The exceptions to the rule are contained *inter alia* in S. 11 of the Suits Valuation Act and S. 21 of the Civil Procedure Code. By virtue of these sections, certain defects of

1. (1886) L R 13 Ind App 134.

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jurisdiction are put on a par with "irregularities in the initial procedure". In regard to the pecuniary jurisdiction of a Court, S. 11 of the Suits Valuation Act and in regard to its territorial jurisdiction, S. 21, Civil Procedure Code, recognise that there may be a waiver on the part of the defendant and that the absence of jurisdiction does not render the decree a nullity. As Mr. Varadachariar contends, S. 21 does not in terms apply; but the rule has been held to be of general application and the principle underlying S. 21 has been applied to cases which do not strictly fall within its terms. *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2) is an authoritative ruling on the point. In that case the Court had jurisdiction to try the mortgage suit at the time it was instituted. It had jurisdiction at the time the preliminary decree was passed but lost jurisdiction when it passed the final decree. Objection was taken to the validity of the decree in execution, but it was overruled on the ground that the objection must be deemed to have been waived. S. 21 runs thus :—

"No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of First Instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been consequent failure of justice."

No objection could have been taken to the place of suing, because the suit was instituted in the proper Court: nor was it the Appellate or Revisional Court that disallowed the plea of want of jurisdiction. *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2) is, therefore, a clear authority for the position that although S. 21 does not in terms apply, the principle underlying it holds good.

In *Chockalinga Pillai* v. *Velayudha Mudaliar* (3) a final decree was passed without objection in a mortgage suit by a Court which had by then lost territorial jurisdiction by reason of a Government notification. In a subsequent suit brought to set aside the decree on the ground that the decree was void for want of jurisdiction, it was held that the defendant having waived the plea of want of jurisdiction, it was no longer open to him to raise it. I observed in my judgment in that case (page 459) :—

"The section in terms no doubt does not apply, because it refers to the disallowing of the objection by an Appellate or Revisional Court But the principle is of general application and if in appeal or revision the decree cannot

2. (1920) I L R 43 Mad 675 : 39 M L J 203 (F B).
3. (1924) 47 M L J 448.

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be impeached it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. I respectfully adopt the statement of the law contained in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2) to the effect that the principle underlying S. 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the Appellate or Revisional Court but cured entirely and for all purposes. In my opinion again, this section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. It is difficult to believe that a more stringent rule was intended to be applied to cases where there has occurred a cessation of jurisdiction than to those where there has been initial absence of jurisdiction.'

In the Letters Patent Appeal from this decision, No. 57 of 1924, this view was confirmed.

Mr. Varadachariar strongly contends that although the rule has been extended to a certain extent in these cases, still they only deal with objections that could have been taken prior to the passing of the decree, or compendiously put objections to the place of suing. In the present case it is urged any plea of want of jurisdiction could have been taken for the first time only in execution proceedings and the learned vakil on this ground asks us not to further extend the principle. I cannot accept the contention. If it is conceded that apart from S. 21 there is a principle of general application, I fail to see why we must limit it in the manner suggested. I agree with Sir John Wallis' observation in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2) that the decision of the Privy Council in *Ramabhadra Raju* v. *Maharajah of Jeypore* (4) is not opposed to this view. The Judicial Committee were dealing with the case of a decree which ordered sale of land situate in a scheduled district, and their Lordships held that as the sections of the Code did not apply to a scheduled district, the principle of S. 21 could not be invoked. All that has been decided by the Privy Council is, that if the Code itself does not apply, the principle recognised by it does similarly not apply. I am, therefore, clearly of the opinion that it is now no longer open to the defendant to object to jurisdiction.

The order may next be supported on the ground that the rule of territorial jurisdiction does not apply to execution of mortgage decrees. In *Maseyk* v. *Steel and Co.* (5) a mortgage suit was instituted under S. 19 of the Code of Civil Procedure of 1882 which gives jurisdiction to a Court to entertain a suit in respect of properties partly situated within its jurisdiction and partly out of it. Some of the properties

2. (1920) I L R 43 Mad 675 at 686: 39 M L J 203 (F B).
4. (1919) L R 46 Ind App 151 : 37 M L J 11 (P C). 5. (1887) I L R 14 Cal 661.

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were situated in the district of *N* and some in the district of *R*. One property known as Mahal No. 20 was situated partly within the district of *N* and partly within the district of *R*. The suit was brought in the Court at *R* and the decree was also passed by that Court. In pursuance of that decree, the mortgage properties, including Mahal No. 20, were sold by the *R* Court. The question that had to be decided was, was the sale of this Mahal not wholly situated in the *R* district valid ?

Petheram, C. J., observing that execution of a money decree stood on a different footing from execution of mortgage decrees, held that the power of the Court in executing mortgage decrees was not limited by the territorial jurisdiction of that Court. In the case of a money decree, the Court cannot attach property outside its jurisdiction, for, the decree merely awards a sum of money and does not prescribe the method by which that sum shall be recovered. In the case of a mortgage decree, however, the decree itself directs the sale of the property by the Court and it is practically in the nature of a decree for specific performance. On these grounds, the learned Chief Justice held that the rule of territorial competency does not apply to execution of mortgage decrees. The other learned Judge, Mr. Justice Ghose, was also of the same opinion.

Section 19 referred to in the judgment, it will be seen, corresponds to S. 17 of the present Code. If immoveable property is situate within the jurisdiction of different Courts, a suit in respect of it may be instituted in any Court within the local limits of whose jurisdiction any portion of that property is situate.

With reference to *Maseyk* v. *Steel and Co.* (5) I must make two observations. First, some passages in the judgment may give the impression that the reason for the decision was that as S. 19 authorised the institution of the suit, the authority extended also to execution proceedings. But the decision is not based on this narrow ground, nor is there any warrant for the position that the section which in terms refers only to the institution of the suit applies also to execution proceedings.

The second observation I have to make is, that the judgment deals only with the actual case that arose, that is to say, the sale of property partly within the Court's jurisdiction and partly outside, and although there are some expressions of doubtful import, there is no definite pronouncement in

5. (1887) I L R 14 Cal. 661.

regard to the law if the property sold is wholly outside the jurisdiction.

In *Kartick Nath Pandey* v. *Tilukdhari Lal* (6) this principle was recognised and *Maseyk* v. *Steel and Co.* (5) was cited with approval. I may incidentally say that this case is on all fours with the present. At the time of the passing of the mortgage decree the property was wholly situate within the local limits of the Court, and after the decree the district within which the property was situate was transferred to the local jurisdiction of another Court. It was held that the Court which passed the decree had authority to execute its decree and bring the property to sale. I am not now concerned with the wider point whether the Court can in all cases execute its own decree. I am referring to this case only for the more limited position that a Court can execute a mortgage decree passed by itself although the property to be sold is wholly or partly outside its jurisdiction.

*Gopi Mohan Roy* v. *Doybaki Nundun Sen* (7) is an instructive case. It was decided by a Bench of which Ghose, J. who took part in *Maseyh* v. *Steel and Co.* (5) was a member. The suit was on a mortgage and related to two properties each within the jurisdiction of a separate Court. The Court within whose jurisdiction one of the properties was situate passed the decree and it was held that it could sell the other property also although it was outside its jurisdiction. Ghose, J., observed that he did not intend to lay down a contrary rule in the earlier case, *Maseyk* v. *Steel and Co.* (5). The fact that one item was wholly outside the Court's jurisdiction was held not to make any difference.

In *Tincouri Debya* v. *Shib Chandra Pal Chowdhury* (8) Prinsep and Ameer Ali, JJ. affirmed *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (7) on the broad ground that it would be impossible to give effect to the provisions of the Transfer of Property Act relating to sales if it were held necessary to apply to different Courts to obtain realisation of the mortgage debt.

In *Begg, Dunlop and Co.* v. *Jagannath Marwari* (9) it was held that a Court is not competent in execution of a decree for money to attach a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of the Court. Mr. Justice Mukherjea in the

5. (1887) I L R 14 Cal 661. 6. (1888) I L R 15 Cal 667.
7. (1891) I L R 19 Cal 13. 8. (1894) I L R 21 Cal 639.
9. (1911) I L R 39 Cal 104.

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course of his judgment observes that an exception is recognised in the case of mortgage decrees to the general rule that no Court can in execution assume jurisdiction over property outside its territorial limits.

In some of the cases mentioned above [see *Maseyk v. Steel and Co.* (5) and *Gopi Mohan Roy v. Doybaki Nundun Sen*(7)] the learned Judges tried to overcome the difficulty presented by S.223, corresponding to S.39 of the present Code. Under that section the Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court and the section contains four clauses (*a*), (*b*), (*c*) and (*d*) showing when this procedure is to be adopted. The view that found favour with the Judges was that "may" in the section means "may when necessary". In the case of a mortgage decree, the Court which passes it directs the sale by itself of the property mortgaged and in such a case sending of the decree to another Court is optional and not compulsory. In the case of attachment in pursuance of a decree there is assumption of jurisdiction for the first time after the decree and the section then operates compulsorily.

The Calcutta High Court has thus uniformly held (and there is quite a string of decisions on the point) that in the case of a mortgage decree, a Court which passed it may notwithstanding the fact that the property is outside its jurisdiction, bring it to sale. We have not been referred to any case of the Madras High Court which has refused to follow this rule. In matters of procedure it is more important that the law should be certain than that it should be logical, and whatever my own view may be, if the question has to be decided on principle, I am content to follow the Calcutta decisions not only for the reason that some very eminent Judges have taken part in them but also because, what with the defective provisions of the Code relating to jurisdiction and what with the constantly occurring territorial re-distribution, there is scarcely a question free from doubt and the view of the Calcutta High Court, in the circumstances, affords some measure of protection to decree-holders.

I shall now deal with the last of the three grounds I have mentioned. S. 24 gives the High Court or the District Court power to transfer suits and other proceedings. The material part of the section reads thus :—

5. (1887) I L R 14 Cal 661. 7. (1891) I L R 19 Cal 13.

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"The High Court or the District Court may transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same."

Mr. Varadachariar's contention is that this does not apply to execution proceedings. He puts his argument thus :—The test of competency in the case of execution proceedings is territorial jurisdiction. How can then an execution petition be transferred from a Court to a Court which has no such jurisdiction ? It can be transferred only under the section to a Court competent to dispose of it. A Court without local jurisdiction is not competent to dispose of the execution application. He thus contends that the words of the section by implication show that the section is not intended to deal with execution applications. I am not prepared to accept this argument. Under the section a suit pending in any Court may be transferred to any other Court competent to try it. To take a concrete instance, the High Court may transfer a suit pending in the District Court of Tinnevelly to the District Court of Rajahmundry. The District Court of Rajahmundry is not strictly competent to try the case as it is wanting in territorial jurisdiction. Does it then mean that a suit cannot be transferred to a Court not having local jurisdiction ? If this view be adopted, the very object of the section will be defeated, and possibly very few suits, if any at all, can be transferred. This consideration makes it clear that in regard to suits competency is not referred to in the section in the sense of territorial or local competency.

Now, coming to execution applications, the scheme of the Code seems to indicate that pecuniary competency in a Court need not exist. Mr. Varadachariar asks, if in the case of execution application pecuniary competency is always out of the question and S. 24 is to be held as authorising transfer to a Court not possessing territorial competency, what possible meaning can reasonably be given to the words "competent to dispose of the same"? It seems to me that this objection does not take count of the fact that there may be other kinds of incompetency so far as an executing Court is concerned. To take an instance, under O. 2, R. 4, a decree directing delivery of possession of immoveable property cannot be transmitted to any Presidency Court of Small Causes for execution. I am therefore of opinion that S. 24 applies to execution proceedings. [See *Velliappa* v. *Subramaniam* (10), *Nassarvanji* v.

10. (1915) I L R 39 M 485: 29 M L J 172.

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*Kharsedji* (11) and *Muhammad Habib-ullah* v. *Tikam Chand* (12)].

Mr. Varadachariar next contends in the alternative that should S. 24 be held to apply to execution proceedings, they can be transferred only to Courts competent under S. 39, Civil Procedure Code, to dispose of them. In other words, he urges that the only Courts to which decrees can be transferred are those mentioned in S. 39, because they are the only Courts possessing jurisdiction. In effect, his contention is that S. 39 gives to the Court that passed the decree a power to transfer, whereas S. 24 gives a similar power, and no higher power to a superior Court. This construction is far-fetched and if adopted will render S. 24 so far as execution proceedings are concerned almost useless.

A fourth point is raised by the learned Advocate-General who appears for the respondent that on a right construction of Ss. 37, 38 and 39 the Court which passed the decree as well as the Court which has jurisdiction owing to territorial re-distribution, both these Courts have jurisdiction to execute the decree.This argument extends to all decrees, money decrees as well as mortgage decrees. It is very difficult to reconcile the decisions that have been cited on the point and *Seeni Nadan* v. *Muthuswami Pillai* (13), a judgment of three Judges, illustrates the range of conflict of opinion on this subject. As my decision on the previous points disposes of this appeal, I would prefer to express no opinion on this question. I may repeat what I said on a cognate matter in *Chockalinga Pillai* v. *Velayudha Mudaliar* (3) that in view of the great uncertainty that prevails on this subject, the Legislature should, in clear and unequivocal terms, lay down as to which Court possesses jurisdiction in such cases. The appeal fails and I would dismiss it with costs.

Madhavan Nair, J.

*Madhavan Nair, J.* :—I have had the advantage of reading the judgment of my learned brother. I agree with him in holding that this appeal should be dismissed with costs but I prefer to rest my judgment on the short ground that since the appellant did not object to the jurisdiction of the Court at the earliest opportunity, he is now precluded from raising that question on the principle underlying S. 21 of the Code of Civil Procedure. Under that section, unless objection is

3. (1924) 47 M L J 448 at 459. 11. (1897) I L R 22 Bom 778.
12. (1924) I L R 47 A 57.
13. (1919) I L R 42 M 821 : 37 M L J 284 (F B).

taken to the place of suing at the earliest possible opportunity, no objection can be taken in appeal or in revision. As contended for by Mr. Varadachariar in his able argument, the section in terms does not apply ; but the decisions of this Court have on different occasions applied the general principle underlying S. 21 to cases which do not fall strictly within its scope. The most recent decision on the question is the one reported in *Chockalinga Pillai* v. *Velayudha Mudaliar* (3) by Phillips, J. and my learned brother. In that case a suit upon a mortgage was instituted in the Kumbakonam Court when that Court had jurisdiction over the place where the mortgaged property was situated. Owing to the transfer of jurisdiction from that Court to the Mayavaram Court, the former Court lost the jurisdiction over the place where the mortgaged properties lay at the time of the passing of the final decree. No objection was raised as to the competency of the Court to pass the final decree. In a suit brought to set aside the decree on the ground that it was void for want of jurisdiction, it was held that since the objection was not taken at the earliest possible opportunity, it must be deemed to have been waived. Both the learned Judges expressed the opinion that, though the section in terms does not apply because it refers to the disallowing of the objections by an Appellate Court or Revisional Court, still the principle is of general application and that the validity of the decree then under consideration could not be impeached in a suit brought to set aside the decree. It is stated by Phillips, J. that "the principle underlying the section is that waiver of territorial jurisdiction is recognised by law whereas it has been consistently held that other forms of jurisdiction such as jurisdiction of the subject-matter or pecuniary jurisdiction cannot be waived by consent of parties." For holding that the principle underlying the section is of general application, reliance was placed on the Full Bench ruling reported in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2). In that case the Court which passed the final decree in a mortgage suit had no jurisdiction to pass the decree and objection was taken in execution to the validity of the decree. In overruling the objection it was pointed out by the Full Bench that "the effect of the section is that objections which the Appellate or Revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the

2. (1920) I L R 43 M 675: 39 M L J 203 (F B).
3. (1924) 47 M L J 448.

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passing of the decree in the original Court, that the ordinary way of questioning a decree passed without jurisdiction is on appeal or in revision and that, if this is forbidden, a Court of first instance cannot in execution do that which the Appellate or Revisional Court is precluded from doing."

Mr. Varadachariar's contention that since his plea as regards the want of jurisdiction could have been taken for the first time only in execution proceedings in this case S. 21 of the Code of Civil Procedure which deals only with the objection as to the place of suing should not be applied, cannot be accepted. As pointed out by my learned brother, no reason is suggested for placing this limitation upon the general principle underlying S. 21. The decision of the Privy Council in *Ramabhadra Razu* v. *Maharaja of Jeypore* (4) does not support the contention of the learned vakil for the appellant. In that case an order for sale of the mortgaged property situated in a scheduled district to which the Civil Procedure Code did not apply was made by the Subordinate Judge's Court of Vizagapatam. It was held by their Lordships of the Privy Council that the order for sale was bad as made under sections of the Code which did not apply to the scheduled district and that section 21 of the Code of Civil Procedure did not apply to the case. As pointed out by Wallis, C. J., they had not to consider the application of S. 21, where all the mortgaged properties were within the jurisdiction of the Courts governed by the Code of Civil Procedure. I am, therefore, of opinion that the appellant in this case is not now entitled to take the objection that the Court had no jurisdiction to sell the property.

I do not express any opinion on the other points dealt with by my learned brother in his judgment.

A. S. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Unnamalai Ammal and another . . . *Appellants** (*1st and 10th defendants*)

*v.*

Abboy Chetty and another ... *Respondents* (*Plaintiffs*).

Unnamalai Ammal v. Abboy Chetty.

*Hindu Law—Joint family—Manager—Mortgage by—Interest conveyed under—Entire property mortgaged or mortgagor's share therein only—Tests—Description of property as absolutely belonging to mortgagor—Effect.*

*Appeal No. 268 of 1922. 24th August, 1925.

4. (1919) L R 46 Ind App 151 : 37 M L J 11 (P C).

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The question for decision was whether a mortgage executed by *R* of the property of a joint Hindu family consisting of himself and his father operated on the entire property mortgaged or only on *R's* share therein.

*R* was the manager of the joint family at the time of the mortgage and was legally competent to mortgage the whole property. The mortgage purported to be of the entire property and not merely of *R's* share therein. And there was nothing in the mortgage-deed to repel the natural inference that what was intended to be conveyed was the whole property. There was, however, a recital in the mortgage-deed that the property mortgaged belonged absolutely to *R*.

*Held*, that the mortgage operated upon the entire property mortgaged and not merely on *R's* share therein.

The interest conveyed should be held to be that which the executant was capable of conveying. The recital that the executant was the owner may be treated as surplusage.

Appeal against the decree of the Court of the District Judge of South Arcot, dated 30th January, 1922, in O.S.No.11 of 1921.

*S. T. Srinivasagopalachari* for appellants.

*A. Krishnaswami Aiyar* and *K. R. Rama Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This suit has been brought to enforce three mortgages evidenced by Exs.A, B & D. Audi and Ramaswami were father and son. Exs. A & B were executed by Ramaswami and D was executed after Ramaswami's death by Audi and Ramaswami's widows, the 1st defendant and another. Subsequent to the execution of these mortgages, the 1st defendant obtained a decree for maintenance against Audi and in execution of it she and her father, the 10th defendant, became the purchasers of the properties which had been previously mortgaged.

In regard to the first two deeds the question is, did the interest of Audi pass to the plaintiffs, the mortgagees. They were executed by Ramaswami, the son, but the Lower Court has found, and we agree with the finding, that he was the manager of the family. As regards the question whether the moneys were borrowed for family purposes, the learned Judge relying mainly on oral evidence and probabilities has come to the conclusion that they were not so borrowed. He, however, has failed to give effect to the admission contained in the later document,Ex.D. It is very clearly stated in it that the moneys under Exs. A & B were borrowed by Ramaswami for purposes binding on the family and as we have said it was executed not

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only by Audi but also by the 1st defendant. No reason has been shown why this admission should not be acted on. It must be remembered that evidence in the suit was given long after the transaction, whereas the interval of time between Exs. A and B on the one hand and D on the other was only four years. The Lower Court has, however, come to the conclusion that A & B are binding upon the share of Audi but for a different reason. It has been held that by Ex. D Audi ratified the mortgages A and B. This view may be open to question but we agree with the conclusion of the Lower Court.

Next we have to deal with Ex. D. It was executed shortly after the death of Ramaswami. The consideration, namely, Rs. 4,000 was made up thus :—

| | | Rs. |
|---|---|---|
| (1) | Balance of interest due under Exs. A and B ... | 382 |
| (2) | Balance due by Ramaswami for goods supplied ... | 130 |
| (3) | Cost of Stamp for Ex. D ... | 20 |
| (4) | Amount received in cash ... | 3,468 |
| | Total Rupees ... | 4,000 |

The plaintiffs admitted that the fourth item was not due as they had not paid it and so no question arises in regard to it. Regarding the other three items, the Lower Court has held against the plaintiffs. This finding cannot be supported. There is clear admission of Audi (Ex. E) which the Lower Court has somehow overlooked. According to that, all the sums excepting the last were received by the executants. The first item of D is the balance of interest due under A and B. This item having been disallowed, the learned Judge directed that interest upon A and B should be calculated as if credit for interest in D had not been given. As we are holding that the first item in D is due, it will not be necessary to adopt this course. In calculating interest under A and B credit must be given for the amount of interest included in D. As regards D, our conclusion is, that the first three sums are due and they will carry interest at the rate provided in the document.

There remains lastly the question of law raised by Mr. Srinivasagopalachari, the learned Counsel for the appellants. He has contended that in Exs. A and B Ramaswami described the properties as absolutely belonging to him but, as in fact he was entitled only to a half-share, the mortgages must operate only on that share. We cannot accept this contention.

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The properties that were mortgaged were the entire properties and not Ramaswami's share in them. The description given shows that it was the entire property that was intended to be mortgaged. The recital that the executant was the owner may be treated as surplusage. Not only did he purport to mortgage the entire property, but on our finding he possessed the legal capacity to do so. As the manager of the family he was competent to enter into a transaction binding on the whole property. There were thus three elements present. First, he purported to mortgage the whole property; secondly, he was legally competent to do so; and, thirdly, there is nothing in the document to repel the natural inference that what was intended to be conveyed was the whole property. *Sankaranarayana Pillai* v. *Rajamani* (1) and *Sabapathy Chetty* v. *Ponnuswami Chetty* (2) are clear authorities for the position that in the circumstances the interest conveyed should be held to be that which the executant was capable of conveying. *Balwant Singh* v. *R. Clancy* (3), strongly relied on by the learned counsel, was distinguished in those two cases, and we adopt the observations on this matter in the judgments in those cases. We may observe that *Sabapathy Chetty* v. *Ponnuswami Chetty* (2) is almost on all fours with the present.

The decree of the Lower Court is modified and the following decree is substituted. There will be a mortgage decree for the amounts due under A and B. There will similarly be a mortgage decree for the amount due under D. The plaintiffs will first bring to sale the properties in A and B for the amounts due under them. If after satisfaction of those mortgages there is any balance, that will be applied towards the debt due under D. The properties mentioned in D will be sold only in the event of any balance remaining even after the moneys have been so applied.

The appellants will pay the respondents the costs of the appeal. There will be no order as to costs in the memorandum of objections.

A. S. V. *Decree modified.*

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1. (1923) I L R 47 M 462 : 46 M L J 314.
2. (1914) 28 I C 365.
3. (1912) I L R 34 A 296 (P C).

## [FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax,
Madras ... *Referring Officer**
*v.*
Messrs. King and Partridge ... *Respondents.*

F. B.
Commissioner of Income-tax
*v.*
Messrs. King and Partridge.

*Income-tax Act (XI of 1922), S. 11—Professional earnings—Profession tax paid under S. 111, Madras City Municipal Act—Nature of—If an item of deduction.*

Profession tax paid by a firm of attorneys practising in Madras under S. 111 of the Madras City Municipal Act cannot be allowed as a deduction from the taxable income "as an expenditure incurred solely for the purposes of such profession." within the meaning of S. 11 of the Income-tax Act.

Profession tax is a contribution to the Municipality from the income of the assessee and stands in the same footing as income-tax itself. The amount of tax varies with the income and it is in no sense a license fee.

Case stated under S. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in his Letter No. 2364|24, dated the 6th January, 1925, referring for the decision of the High Court the following question, *viz.* :—

"Whether the profession tax levied under S. 111 of the Madras City Municipal Act must be allowed as a deduction from the taxable income as an expenditure incurred solely for the purposes of the profession within the meaning of S. 11 of the Indian Income-tax Act (XI of 1922)."

*M. Patanjali Sastri* for Referring Officer.

*R. N. Aingar* instructed by *T. D. Narasiah* for respondents.

The Court made the following

ORDER :—This is a reference under S. 66 (2) of the Indian Income-tax Act (XI of 1922) and the question submitted for our opinion is whether profession tax paid under S. 111 of the Madras City Municipal Act should be allowed as a proper deduction from the taxable income "as an expenditure incurred solely for the purposes of the profession" of the assessees within the meaning of S. 11 of the Income-tax Act.

*R. C. No. 3 of 1925. 29th October, 1925.

F. B.

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The assessees are a firm of attorneys practising in Madras and they claim that they are entitled to the deduction above mentioned. The Commissioner of Income-tax was of opinion that the deduction claimed was not an allowable item.

The answer to the question put to us depends in our opinion upon the nature of the profession tax levied by the Municipality. If the profession tax is a contribution from the income of the assessee to the Municipality it will stand on the same footing as income-tax itself which is such a payment to the Government. It is clear in assessing the income of a person the income-tax he pays could not be deducted for what is paid is a part of the income itself and not an expenditure for earning that income or profit. It was so ruled in *Ashton Gas Co.* v. *Attorney-General* (1) and the proposition is conceded before us. What then is the profession tax? Is it a payment made out of the income of the tax-payer or is it an expenditure which he has to incur to enable him to earn his income? We are of opinion that it is the former and not the latter.

Under the City Municipal Act (IV of 1919), S. 111, every person not liable for the Companies tax who within the City and for a period of 60 days in the half-year exercises "a profession, art, trade or calling or holds any appointment, public or private, bringing him within the taxation rules of Sch. IV" is liable to pay the profession tax. Now Sch. IV makes it clear that the amount of tax payable is dependent on the income of the person taxed, the minimum being an income of Rs. 100 a month except in the cases of hotel-keepers, etc., dealt with under Class IX. Professional men are taxed not because they carry on their profession but because they do so and earn an income. The amount of tax varies with the income and if a person is over-taxed he has a right of appeal.

Now the nature of the tax cannot vary with the individual taxed. In the case of persons holding appointments under the Government it seems to us impossible to predicate that they pay profession tax to enable them to earn their salary. S. 111, Explanation 2 makes even pensioners liable for profession tax as if they were holders of appointments carrying a salary equal to the pension. In their cases it is still more difficult to treat the profession tax as a payment by them to earn their income. It is clear in these cases the Municipality is claiming a part of their income as a tax. A different rule, it

1. (1906) A C 10.

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seems to us, cannot be applied in the case of men who make their income by professional services. It is argued that because S. 111 uses the words "by way of license fee" we must hold that the payment of the profession tax is for the purpose of obtaining a license to carry on one's profession in the City. We are unable to accept this argument. The Act deals with several matters in which the obtaining of a license is a pre-requisite to the carrying on of a business or profession within the Municipal limits. We find examples of it in Chap. XII of the Act. There is no provision in the Act which makes the carrying on of one's profession without paying the profession tax illegal ; and no formal license is issued on payment. The tax, if unpaid, can no doubt be collected by coercive processes of distraint, etc.; but the carrying on of the profession is not interfered with. It is clear, therefore, that the Act does not treat the profession tax as a payment for a license. The words " by way of a license fee " seem to us to show that the payment is to be made in the manner of a license fee but do not imply that in itself the tax is a license fee. It is true that under Part II, Sch. IV, R. 9, the tax is estimated on general considerations and not on the exact amount of ascertained income of the person taxed. This merely provides a method of estimating one's income to avoid the trouble of having accounts produced and examined in every case. The fact that when an over-estimate is made liberty is given to the person taxed to produce his accounts and prove his income and get his tax reduced indicates that the proper basis of the tax is the income earned. In this view the payment of the profession tax cannot be held to be " an expenditure for the purpose of such profession " though it is incurred in connection with it. The words " for the purpose of " were construed by Lord Davey in the case of *Strong and Co., Ltd. v. Woodifield* (2), where the expression was " for purposes of the trade." His Lordship observed : " These words appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits." Following that view we consider that the payment of profession tax does not fall within S. 11.

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2. (1906) A C 448, 453.

F. B.

Commissioner of Income-tax *v.* Messrs. King and Partridge.

The cases of *Smith* v. *Lion Brewery Co., Ltd.* (3) and of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (4) were cited by the learned counsel for the assessees. But, instead of helping him, they show what may properly be treated as money spent for purposes of trade. The expenses referred to in those cases were directly incurred for the purpose of increasing the income of the trade and were therefore allowed to be deducted. These cases do not apply here in the view we take of the nature of the profession tax. Along with these cases should be considered the case of money spent for an anti-prohibition campaign by a brewer which was disallowed as a deduction as it was held that it was not money directly spent for increasing the brewer's income though it may have indirectly that effect. *Ward and Co.* v. *Commissioner of Taxes* (5).

The case of *Commissioner of Income-tax* v. *Nedungadi Bank* (6) referred to the Companies tax and not to the profession tax. The observation in it regarding profession tax that it stands on the same footing as income-tax supports the contention of the Government, but we do not look upon it as any authority on the point before us as the observations is only an *obiter dictum*. The case is not otherwise applicable.

*Etherington's case* (7) referred to excess profits duty which stands on a different footing altogether ; as pointed out by the learned Judge there it was declared by statute to be an admissible deduction. Furthermore, the case was one of net profits of the company on which dividend was payable to the manager and not an income-tax case.

For the above-mentioned reasons we have come to the conclusion that the amount of profession tax paid is not a proper deduction for assessment of income-tax and we answer the question submitted in the negative. The assessees will pay the Commissioner's costs and Vakil's fee, Rs. 250.

T. S. V. *Reference answered in the negative.*

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3. (1911) A C 150. 4. (1915) A C 433. 5. (1923) A C 145.
6. (1924) I L R 47 Mad 667 : 47 M L J 160. 7. (1919) 2 Ch 254.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Chittammal and another ... *Appellants** (*Respdts. 2 and* 3)

*v.*

Ponnuswami Naicker and another ... *Respondents* (*Petitioners*).

Chittammal v. Ponnuswami Naicker.

*Provincial Insolvency Act, S.* 56 (3)—*Order under, directing person in possession of property claiming it adversely to insolvent to deliver it up to Official Receiver—Validity—Insolvent not entitled to present possession of such property -Effect—Procedure appropriate in such case—Application under S.* 4—*Order under S.* 56 (3) *if can be treated as one under S.* 4—*S.* 56 (3)—*Determination of rights of parties under—Effect.*

If a person is in possession of property on behalf of the insolvent, or claims under the insolvent, possession of such property may be taken under the orders of the Court by the Official Receiver. But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under S. 56 of the Provincial Insolvency Act and to direct the person so in possession to deliver up the property to the Official Receiver. In such a case proceedings should be taken under S. 4 of the Act.

*Per Devadoss, J.*—An order made under S. 56 (3) of the Act on an application made under S. 56 could not, if such order was one which the Court had no jurisdiction to pass under that section, be held to be one under S. 4 of the Act.

An order under S. 56 (3) does not finally determine the rights of the parties, though the Judge may incidentally determine the question.

Appeal against the order of the District Court of Tinnevelly, dated the 4th November, 1924, in I. A. No. 265 of 1923 in I. P. No. 17 of 1921.

*K. Bhashyam Aiyangar* and *S. Rajagopalachari* for appellants.

*K. R. Rangaswami Aiyangar* and *R. Krishnaswami* for respondents.

The Court delivered the following

Devadoss J.

JUDGMENTS :—*Devadoss, J.* :—This appeal is against the order of the District Judge of Tinnevelly directing the appellants to hand over possession of the property in their possession to the Official Receiver and his lessee. The 1st respondent herein is the lessee of the property from the 2nd respondent who is the Official Receiver of Tinnevelly. The appellants were in occupation of the property in dispute from the year 1897. The respondents applied to the District Judge for an order under S. 56 of the Provincial Insolvency Act directing

*A A O No. 438 of 1924. 22nd September, 1925.

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Devadoss, J.

the appellants to hand over possession of the property in dispute to the respondents on the ground that the property was the property of the insolvent. The learned Judge has passed an order under S. 56 (3) in favour of the respondents. The question for consideration is whether such an order can be passed against persons who claim adversely to the insolvent. S. 56, cl. 3, para. 2, is in these terms :—

"Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove."

An application under S. 56 is made for the purpose of realisation of the property of the insolvent. If a person is in possession of the property on behalf of the insolvent, or claims under the insolvent, possession of such property may be taken under the orders of the Court by the Official Receiver. But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under S. 56, for the second paragraph of cl. 3 specifically says that "nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove." The corresponding provision in the Presidency Towns Insolvency Act is S. 58 ; and cl. 2 of that section puts the matter beyond doubt. It is as follows :—

"The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, and the Court may, on his application, enforce such acquisition or retention accordingly."

The position of the Official Assignee is therefore the same as that of a Receiver appointed under the Code of Civil Procedure. O. 40, R. 1 (2) is as follows :—

"Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

The power of the Court under the Provincial Insolvency Act, S. 56 is not any higher than the power of the High Court under the Presidency Towns Insolvency Act, S. 53. The Court therefore cannot, acting under S. 56, direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application

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to possession of such property. If a title, however flimsy, is set up by the person in possession, the Court should not act under S. 56. It is open to the Court on a proper application being made under S. 4 of the Provincial Insolvency Act to try the issue whether the insolvent is entitled to the property or not. But in order to enable the Court to do that a proper application ought to be made under S. 4 of the Provincial Insolvency Act, and the other side should be asked to plead thereto.

In this case it is suggested for the respondents that, though the application was made under S. 56, it must be deemed that the enquiry was held under S. 4 and the order was made under that section. But it is clear from the sixth paragraph of the District Judge's order that he passed the order only under S. 56 (3) and we cannot import into it something which is not there. If the application was one under S. 4 the 1st respondent should not have been made a party. Nobody other than the Official Receiver can move under S. 4 unless the Official Receiver is unwilling to act and that the Court authorises a creditor or any other person interested in preserving the insolvent's estate to act under that section in the name of the Official Receiver.

It is again urged that the question of the title of the appellant has been gone into and has been found against, and therefore it is unnecessary that there should be a fresh proceeding under S. 4. When an order is passed under S. 56 (3) it does not determine the rights of the parties and though the Judge may incidentally determine the question yet it cannot be said that the question is finally determined. It would not be right to allow a loose procedure to obtain in insolvency proceedings. The Law of Insolvency is not properly understood in the mofussil and it would not be right on the part of the Court to adopt a loose procedure for the purpose of realising the estate of the insolvent Such a procedure would lead inevitably to hardship and to an unsettled state of the law.

In regard to the merits it is unnecessary to say much. The appellants were in possession of the property from 1897. They claim to have been in possession of the property by virtue of an arrangement in the family. It is urged by Mr. Bhashyam Aiyangar that no registered document is necessary for a family arrangement. If the appellant could show that there was a

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proper arrangement, they would be entitled to retain possession of the property against the insolvent and against the Official Receiver.

On behalf of the respondents it is urged that the 1st appellant is dead and therefore the 2nd appellant, daughter of the 1st appellant, has no right to be in possession of the property. This question again will have to be gone into fully, and, in the absence of an investigation into the title of the 2nd appellant, it would not be right to deprive her of the possession of the property and drive her to a suit. If the order is to be construed as an order under S. 4 a suit would be barred; if it is construed as an order under S. 56 (3) the order is illegal inasmuch as the insolvent is not entitled to present possession of the property.

In a recent case it was decided by Spencer, J. and myself that the power given by S. 4 of the Provincial Insolvency Act is subject to the provisions of the Act, one of which is the proviso to S. 56 (3) which is in the way of the Court removing any person from the possession of property whom the insolvent has no present right to remove.

The appeal is allowed and the order of the Lower Court is set aside with costs throughout.

Waller, J.

*Waller, J.* :—I agree that, where there is a dispute as to the insolvent's title, S. 56 cannot be invoked. For, in order that that section may be resorted to, the insolvent must have an immediate right to remove from possession. Proceedings therefore should have been taken under S. 4.

A. S. V. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE VENKATASUBBA RAO.

Tanjore Palace Estate by its Receiver,
Sundaram Aiyar ... *Appellant** (*Defendant*)

*v.*

Thiyagaraja Pillai ... *Respondent* (*Plaintiff*).

Sundaram Aiyar v. Thiyagaraja Pillai.

*Limitation Act, Arts.* 137, 142 *and* 144—*Adverse possession—Simple mortgagee—Decree for sale—Suit for possession by purchaser—Trespass subsequent to mortgagee—Effect of—Rights of parties.*

The owner of the *kudivaram* right in certain properties hypothecated the properties in 189[illegible]. The mortgagee filed a suit on the mortgage and obtained

*S A Nos. 82 and 83 of 1921. 5th January, 1922.

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a decree for sale. The plaintiff purchased the properties at the auction sale on 5th September, 1906, and sued for possession on 4th September, 1918. The defendant who claimed title by purchase pleaded acquisition of title by adverse possession as against the original owner as from 22nd May, 1905. *Held,* the possession of the defendant though adverse to the mortgagor did not affect the legal rights of the mortgagee or the auction purchaser, and the suit for possession by the latter was not time-barred.

A simple mortgagee is not affected by the adverse possession of a trespasser against his mortgagor which commences after the date of his hypothecation. Nor does the fact of his obtaining a decree for sale affect the position of the parties. *Vyapuri* v. *Sonamma Bai Ammani,* (1915) I L R 39 M 811 (F B) and *Priya Sakhi Debi* v. *Manbodh Bibi,* (1916) I L R 44 C 425 followed.

Art. 137 of the Limitation Act does not apply to a suit for possession by a purchaser at a sale held in execution of a mortgage decree.

The occasion for the application of Art. 142 does not arise when, upon the facts proved or admitted, dispossession could not have occurred beyond twelve years of the institution of the suit.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Tanjore, in A. S. Nos. 95 and 96 of 1920 against the decree of the District Munsif of Tiruvadi.

*K. V. Krishnaswami Aiyar* for appellant.

*T. R. Venkatarama Sastri* and *K. S. Sankara Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal against the judgment of the Acting Subordinate Judge of Tanjore who reversed the decision of the District Munsif of Tiruvadi on the question of limitation and remanded the suit for disposal on the other issues raised in the case.

The main facts necessary for determining the issue of limitation may be briefly stated. The *kudivaram* rights in the properties to which this suit relates belonged to one Sama Rao and were sold for arrears of rent due by him to the Palace Estate and were purchased by one Maria Pillai on 1st March, 1895, to whom the Palace Estate granted a *patta.* Maria Pillai, on 1st January, 1897, hypothecated the properties to one Nethar Bibi who filed O. S. No. 400 of 1902 and obtained a decree. She assigned the decree to one Thiyagaraja Pillai and he in execution of the decree purchased the properties on 5th September, 1906, and obtained symbolical possession of them on 27th August, 1907. Thiyagaraja Pillai is the plaintiff in the present suit which was filed on 4th September, 1918.

The Palace Estate, the defendant, has set up the plea that the suit is barred by limitation. One Kalki Ramachandra Rao

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obtained symbolical possession of the properties in execution of the decree in O. S. No. 15 of 1894 of the Tanjore Sub-Court and the Palace Estate purchased the properties in 1905 for arrears of rent payable to it by the said Ramachandra Rao.

The Subordinate Judge says in his judgment : " It is not stated or proved by the defendant that somebody else was in possession on the date of the mortgage or that Maria Pillai had no title to mortgage on that date. " Maria Pillai was, therefore, not only the owner of the properties on the date of the mortgage but no one other than himself was in possession of the properties on that date. The Subordinate Judge also finds that the title of the Palace Estate arose only on 22nd May, 1905, and it is to be presumed that the Palace Estate did not claim to have been in possession of the properties previous to 22nd May, 1905. The defendant was thus in adverse possession of the estate from 22nd May, 1905 to 4th September, 1918, the date of the suit. The question to be determined is, whether the possession of the Palace Estate for over 12 years before the suit which admittedly is adverse to the mortgagor is also adverse to the mortgagee or Thiyagaraja Pillai who got the assignment of the decree from the mortgagee and became the purchaser of the properties. The Subordinate Judge relying on *Vyapuri* v. *Sonamma Bai Ammani* (1) held that any adverse possession against the mortgagor would not operate to the prejudice of the mortgagee and that the rights of the plaintiff (purchaser) would not be affected. We are of opinion that the Subordinate Judge's decision is correct. *Vyapuri* v. *Sonamma Bai Ammani* (1) is an authority for the proposition that the mortgage being simple, a trespasser's adverse possession which commences after the date of the hypothecation is not a bar to the mortgagee's right to recover the land. After a review of several cases bearing upon the subject the learned Judges came to the conclusion that the trespasser's possession which is adverse to the mortgagor cannot affect the rights of the simple mortgagee and that it would be unreasonable to hold that the mortgagee's rights are extinguished by the extinction of the mortgagor's title by 12 years' adverse possession before the mortgagee is in a position to protect his rights. The reason for holding that the simple mortgagee is not affected is that he is not entitled to the possession of the property. That this is the principle underlying the decision appears from each one of the

1. (1915) I L R 39 Mad 811 : 29 M L J 645 (F B).

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judgments delivered in the case. In view of the fact that the matter is concluded by the authority of the Full Bench ruling above referred to, we think it unnecessary to discuss the other cases that have been cited before us. It is sufficient to say that this question was considered by the Calcutta High Court in *Priya Sakhi Debi* v. *Manbodh Bibi* (2) where Sanderson, C.J. and Mookerjee, J. adopt the view enunciated in *Vyapuri* v. *Sonamma Bai Ammani* (1). They had to deal with the question whether adverse possession against the mortgagor would affect the mortgagee. At page 433, Sanderson, C. J. says : "In my judgment 'adverse possession' implies that the person against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins."

The mortgage in this case being a simple mortgage, the mortgagee was not entitled to demand possession of the property at the time the defendant No. 3 went into possession in 1892 and indeed the plaintiff has never yet become so entitled. Consequently, in my judgment, Art. 144, even if applicable, will not avail the defendant No. 3 to dispute the plaintiff's claim.

Mr. K. V. Krishnaswami Aiyar on behalf of the appellant contended before us that the adverse possession of the trespasser would not affect the mortgagee only so long as he was a mere mortgagee but that he would be affected the moment he obtained a decree for sale. We are unable to follow this argument because the protection afforded to the mortgagee was owing to the fact that he was not entitled to the possession of the property and the mortgagee's position in this respect is not improved by his obtaining a decree for sale. The learned vakil referred us to various cases for the purpose of establishing that, when a mortgagee obtains a decree, his rights under the decree would supersede his rights under the mortgage We do not think that these cases have any bearing upon the question at issue, and following *Vyapuri* v. *Sonamma Bai Ammani* (1) we hold that the rights of the plaintiff (purchaser) were not barred by the adverse possession of the Palace Estate which commenced subsequent to the mortgage in favour of Nethar Bibi. In this view the claim of the plaintiff has not become barred under Art. 144 of the Limitation Act.

1. (1915) I L R 39 Mad 811 : 29 M L J 645 (F B).
2. (1915) I L R 44 Cal 425.

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It has next been argued by the learned Vakil for the appellant that the Article applicable to a suit of this nature is Art. 137 of the Limitation Act. He contends that this being a suit by a purchaser at a sale in execution of a decree, the purchaser is bound to come to Court within 12 years from the date when the judgment-debtor is first entitled to possession; and that Art. 137 in terms applies, and therefore recourse should not be had to Art. 144. What is the result of holding that Art. 137 applies? Although as has been pointed out above, the rights of the mortgagee are not extinguished by any adverse possession against his mortgagor, time against the purchaser under Art. 137 is to be computed from the date the judgment-debtor is first entitled to possession; that is, a purchaser will be precisely under the same disability as the mortgagor. The right conceded to the mortgagee turns out to be illusory and the trespasser who could not set up his adverse possession against the mortgagee becomes enabled to set it up against the purchaser at the execution sale. We may take two illustrations to elucidate this point. Let us suppose that a mortgage is executed in 1880 and the suit upon the mortgage is brought in 1890 which is in time under Art. 132. We shall assume that the suit is finally decided in 1903. The property is brought to sale and purchased in 1904. In the meantime, a trespasser takes possession of the property in 1891 and completes 12 years' adverse possession by 1903. The purchaser sued in 1904. If we accept the contention of the learned vakil for the appellant, the mortgagee being first entitled to possession in 1891, the purchaser's suit filed in 1904 is liable to be dismissed under Art. 137. In the case above stated, if the mortgagee himself becomes the purchaser, the purchase confers on him no rights whatsoever, whereas it is conceded that as mortgagee he had the right to proceed against the property.

The second illustration is this. The mortgage is in 1880. The adverse possession of the trespasser commences in 1881. The mortgagee files a suit upon the mortgage in 1892 and his suit is in time under Art. 132. He obtains a decree in 1894, himself purchases the property and files a suit immediately for possession against the trespasser. If the view pressed upon us regarding the effect to be given to Art. 137 is correct, the suit would be barred as the same was filed more than 12 years since the judgment-debtor was first entitled to possession, that is 1881.

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It will be noticed that Art. 136 refers to a suit by a purchaser at a private sale and the time is to be reckoned from the date when the vendor is first entitled to possession. The sale under Art. 136 is a sale of the interest possessed by the vendor. Similarly under the Art. 137, the sale contemplated must be taken to be the sale of the interest possessed by the judgment-debtor referred to in that Article. Does the purchaser at a sale held in execution of a mortgage decree obtain merely the interest of the judgment-debtor ? The answer is obviously "No." The interest that the purchaser acquires is certainly more than merely the interest of the judgment-debtor though it is not necessary for us to define the exact nature of the interest acquired by him. We would, therefore, hold that Art. 137 does not apply to purchasers at sales held in execution of mortgage-decrees. We consider that this is the only reasonable construction of Art. 137.

We may once again advert to *Vyapuri* v. *Sonamma Bai Ammani* (1). The facts of that case, as appear from the report are these : One Solomon Thenkondan hypothecated certain lands to one Jatho Rao Sahib on 28th August, 1878. The defendant's adverse possession began in 1890. In 1900 the suit was brought on the hypothecation bond by the mortgagee, and a decree for sale was obtained by him on 27th November, 1900. In execution of the said decree the hypothecated lands were sold to the decree-holder's widow, the plaintiff purchased the lands on 31st October, 1906, and obtained the sale certificate on 1st December, 1906. She instituted the suit in the year 1910. It will be seen that adverse possession commenced subsequent to the date of the mortgage, the 28th August, 1878. The suit was instituted about 20 years after adverse possession began. If, therefore, Art. 137 was applied, the plaintiff's suit should have been dismissed. As a matter of fact, it was held by the Full Bench that the possession of the trespasser was not adverse to the mortgagee and the result was that the suit was held to be in time. It is noticeable that it was not argued on behalf of the defendant in that case that Art. 137 applied, although if, as a matter of fact, the said Article was applied, the result of the case would have been different. We are not prepared to say that it was due to a mere oversight that reference was not made to Art. 137 ; it was not referred to because it was thought clearly inapplicable.

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1. (1915) I L R 39 Mad 811 : 29 M L J 645 (F B).

Sundaram Aiyar v. Thiyagaraja Pillai.

It is necessary to deal with another contention of the appellant. He says that the plaintiff put forward a specific case of having obtained possession in 1907 and having been dispossessed in 1908, and that the plaintiff's suit should fail because he was unable to make out the case set up by him. The appellant's vakil argues that Art. 142 is the Article applicable. Assuming for a moment that the plaintiff came with a specific case of dispossession under Art. 142 and that his allegation in that behalf was disbelieved by the Court, does it follow that the plaintiff's suit should be dismissed on that ground? *Ex hypothesi* his right to sue accrued only on the 5th September, 1906. If he instituted the suit within 12 years from that date we see no ground for dismissing his suit on the score that he alleged having obtained possession on a subsequent date and was dispossessed by the defendant. The plaintiff is entitled to say that the allegation relating to his possession and dispossession may be treated as superfluous and that he may be allowed to rest his case upon the footing that his suit is within 12 years of the accrual of his right. The occasion for the application of Art. 142 does not arise when, upon the facts proved or admitted, dispossession cannot possibly have accrued beyond 12 years of the institution of the suit. The plaintiff could have obtained possession, if at all, only after his purchase on the 5th September, 1906, which falls within 12 years from the date of this suit. In our opinion therefore Art. 142 is inapplicable.

For these reasons we agree with the Subordinate Judge that the suit is not barred by limitation, and would dismiss the appeal with costs.

Appeal No. 83 of 1921 is also dismissed with costs.

T. S. V.

*Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

Magam D. Venkatesam Chetty and another... *Appellants** *(Defendants)*

*v.*

Mothichand Gulabchand ... *Respondent (Plaintiff).*

F. B.

Venkatesam Chetty *v.* Mothichand Gulabchand.

*Civil Procedure Code, O. 41, R. 22—Applicability—Original Side appeals —Memorandum of objections—If competent.*

The provisions of O. 41, Civil Procedure Code, apply to appeals from the Original Side of a High Court, and in such appeals it is competent for a respondent to file a memorandum of objections. *Bhimasena Rao* v. *Venugopal Mudali*, 48 M.L J 384 overruled.

Memorandum of cross-objections sought to be preferred by the respondents against the decree and judgment of the Hon'ble Mr. Justice Devadoss and the Hon'ble Mr. Justice Waller passed in exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. S. No. 376 of 1918 and Ordinary Original Insolvency Jurisdiction in I. P. No. 112 of 1917 respectively.

*V. Radhakrishnayya* for respondent in S. R. No. 5433 of 1925.

*K. S. Narayana Aiyangar* instructed by *Messrs. Grant and Greatorex* for respondent in S. R. No. 7519 of 1925.

Appellants were not represented in both.

The Court made the following ORDER OF REFERENCE TO A FULL BENCH :—

Kumaraswami Sastri, J.

*Kumaraswami Sastri, J.* :—In this case the question raised is, whether a memorandum of objections can be filed in an appeal from the Original Side. The petitioner before us filed a memorandum of objections but it was returned by the office on the ground that no memorandum of objections could be filed, relying on a decision of the Chief Justice and Srinivasa Aiyangar, J., in *Bhimasena Rao* v. *Venugopal Mudali* (1). We find it difficult to see why a memorandum of objections should not be filed in a Original Side Appeal. Their Lordships of the Privy Council have in *Sabitri Thakurain* v. *Savi* (2) [to which the attention of the learned Judge does not

*S.R Nos. 5433 and 7519 of 1925 in
O S Appeals Nos. 88 of 1924 and 22 of 1925. 27th October, 1925.

1. (1924) 48 M L J 384.
2. (1920) L R 48 I A 76: 40 M L J 308 (P C).

F. B.

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seem to have been drawn, and which overruled the view in *Sesha Aiyar* v. *Nagarathna Lala* (3)], held that the fact that Letters Patent Appeals from judgments on the Original Side are not from one Court to another but from one Judge of the High Court to two or more Judges does not prevent sections of the Code as to security for costs from being applicable and the main ground given by Srinivasa Aiyangar, J., does not therefore hold. Turning to the rules of our Court and the Code, R. 1 of O. 41-A of the Civil Procedure Code which refers to appeals to the High Court from the original decrees of Subordinate Courts says that "the rules contained in O. 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order." So, except for the modifications there, the whole of the Code applies, and under this order there is provision made for memorandum of objections being filed. Then R. 1 of O. 41-B says that "the rules of O. 41-A shall apply so far as may be to appeals to the High Court of Madras under cl. 15 of the Letters Patent of the said Court; provided that it shall not be necessary to file copies of the judgment and decree appealed from." Then R. 2 of that order says that "notice of the appeal shall be given in the manner prescribed by O. 41-A, R. 6." So that O. 41-B distinctly applies to appeals under cl. 15 of the Letters Patent. So far as the Civil Procedure Code is concerned, S. 117 says that "Save as provided in this part or in Part X or in rules, the provisions of this Code shall apply to such High Courts...... " S. 120 of the Code refers to the provisions which will not apply to the High Court in the exercise of its Original Jurisdiction. Then S. 121 refers to the rules in the body of the Code and says that those rules shall be in force until they are annulled or modified in accordance with the rule-making powers given in the Code. S. 129 gives the High Court power to make rules not inconsistent with the Letters Patent to regulate its own procedure. O. 49, R. 3 gives the rules which will not apply to the Original Side of the High Court and, so far as O. 41 is concerned, the only rule which is not applicable is R. 35 about the signing of the decrees.

Turning to the Original Side Rules, we find that specific provision is made for filing memorandum of objections. Rule 351 expressly refers to the respondents' case being printed and refers to the memorandum of objections specifically. So

3. (1903) I L R 27 M 121 : 13 M L J 362.

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that the rules contemplate the filing of a memorandum of objections. Art. 37 of the Fee Rules provides a fee for the filing of a memorandum of objections—Rs. 75.

The only objection that can be taken is that an appeal from the Original Side to the Appellate Side is not an appeal from one Court to another but an appeal from one Judge of the High Court to one or more Judges of that Court, but this objection has been considered by the Privy Council and has been overruled, so far as it relates to security for costs, in *Sabitri Thakurain* v. *Savi* (2). Their Lordships of the Privy Council deal with the various sections of the Code and said that the fact that the appeal was from one Judge of the Court to another under the Letters Patent is no ground for not applying the provisions of the Code.

This decision overrules the judgment of Bhashyam Aiyangar, J. in *Sesha Aiyangar* v. *Nagarathna Lala* (3). Evidently Srinivasa Aiyangar, J., who delivered the judgment in *Bhimasena Rao* v. *Venugopal Mudali* (1) had in mind the decision of Bhashyam Aiyangar, J. in *Sesha Aiyar* v. *Nagarathna Lala* (3). When he speaks of an appeal under the Letters Patent as not being an appeal from one Subordinate Court to another and his attention evidently does not seem to have been drawn to the decision of their Lordships of the Privy Council in *Sabitri Thakurain* v. *Savi* (2) and to the various rules referred to above both in the Civil Procedure Code and in the Original and Appellate Side Rules of the High Court. It seems to me that the argument that an appeal under the Letters Patent from the Original Side is not governed by the Code could not be entertained after the decision in *Sabitri Thakurain* v. *Savi* (2). With all respect I do not agree with the decision in *Bhimasena Rao* v. *Venugopal Mudali* (1). But in view of the fact that a Bench of this Court has held otherwise, and that the question is one of procedure which is likely to arise very frequently I think the case should be referred to a Full Bench so that there may be an adjudication once and for all on the matter. I would, therefore, refer for the decision of a Full Bench the following question :—" Whether it is competent for the respondent in an appeal from the Original Side

1. (1924) 48 M L J 384.
2. (1920) L R 48 I A 76: 40 M L J 308 (P C).
3. (1903) I L R 27 M 121 : 13 M L J 362.

to file a memorandum of objections against the decree appealed from ? "

*Krishnan, J.* :—I agree with my learned brother that the question whether a memorandum of objections could be filed in an appeal from the Original Side should be decided by a Full Bench. The practice has always been to allow such memoranda of objections. Till recently there was nothing contrary to it ; but our attention has been drawn to the decision of the Chief Justice and Srinivasa Aiyangar, J. in *Bhimasena Rao* v. *Venugopal Mudali* (1), where it was held that such a memorandum of objections was not competent in the case of Original Side Appeals. It seems to me that this matter requires further consideration. Order 41-A of the Civil Procedure Code deals with appeals to the High Court from original decrees of Subordinate Courts. Rule 12 of that order refers to memorandum of objections. Order 41-B says that " the rules of O. 41-A shall apply, so far as may be, to appeals to the High Court of Madras under cl. 15 of the Letters Patent of the said Court, provided that it shall not be necessary to file copies of the judgment and decree appealed from. " This order seems to contemplate that a memorandum of objections can be filed in Original Side Appeals in the same manner as in moffusil appeals for there is nothing in O. 41-B to prevent it being considered to be wide enough to include memorandum of objections. This view is supported by the practice that has been hitherto followed. The sections of the Code giving power to the High Court to make rules for regulating its own procedure have been referred to by my learned brother and I do not want to cover the same ground again. It is clear that the rules of practice referred to by my learned brother contemplate the filing of memorandum of objections to one of them which fixes the Court-fee payable. They are rules made with authority and it would therefore seem that a memorandum of objections is competent in the case of Original Side Appeals as well.

The question regarding the taking security for costs in an Original Side Appeal was considered by the Privy Council and the attention of their Lordships was drawn to the case reported in *Sesha Aiyar* v. *Nagarathna Lala* (3), in which Bhashyam Aiyangar, J. had held that the Civil Procedure Code did not apply to appeals from the Original Side and that

1. (1924) 48 M L J 384.
3. (1909) I L R 27 M 121: 13 M L J 362.

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security could not be taken in an Original Side Appeal. Their Lordships dissented from that view and held that the Code applied in such a case. There are observations in that case which make it clear that the Code will apply not only to security proceedings which was the matter which was being dealt with by their Lordships but also other matters arising in appeals under the Letters Patent. After that decision it is difficult to say that there is anything wrong in allowing a memorandum of objections to be filed in an Original Side Appeal. I, therefore, with all respect think that the decision of the Chief Justice and Srinivasa Aiyangar, J., requires reconsideration and I agree to the question proposed by my learned brother being submitted to the Full Bench.

The Court expressed the following

OPINION :—The judgment of the Privy Council in *Sabitri Thakurain* v. *Savi* (2) makes it clear that the provisions of O. 41 will apply to Original Side Appeals under the Letters Patent. Rule 22 of that order expressly provides for cross-objections being raised by respondents. If there were any doubt about it, it would be resolved by the provisions of our own Orders 41-A and 41-B. *See* also O. 49, R. 3. Had the Privy Council case been cited before the Court in the case reported in *Bhimasena Rao* v. *Venugopal Mudali* (1) it would no doubt have come to a different conclusion. We decide accordingly that the Memorandum of Objections in this case is competent. Costs will be costs in the cause.

T. S. V.

## PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD PHILLIMORE, LORD CARSON, SIR JOHN EDGE AND MR. AMEER ALI.

Raja Rajendra Narain Dhanj Deo, substituted for J. C. Aguilar ... *Appellant**

*v.*

Kumar Gangananda Singh and others ... *Respondents.*

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Raja Rajendra Narain Dhanj Deo *v.* Kumar Gangananda Singh.

*Alluvion and diluvion—Regulation XI of 1825, S. 2—Custom under—Proof of—Evidence—Direct evidence for some years—Hearsay evidence to show that custom is immemorial—Admissibility—Changes in course of river—Mode by which they are brought about—If material to custom being set up as defence.*

*P C Appeal No. 126 of 1922. 13th May, 1925.

1. (1924) 48 M L J 384.
2. (1920) L R 48 I A 76 : 40 M L J 308 (P C).

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Raja Rajendra Narain Dhanj Deo *v.* Kumar Gangananda Singh.

The defendant-appellant was the owner of Mauza *R* and the plaintiffs-respondents were the owners of Mauza *M* in Pargana *F*. The river Gandak or Bari Gandak flowed between the two villages, Mauza *M* being situated on its northern side and Mauza *R* on its southern side. The river Ganges flowed at some distance to the south of the Gandak. In 1899 the Ganges began its encroachment northwards and ultimately joined with the Gandak, and by the combined action of the two rivers certain of the lands which had formed part of the Mauza *M* were "diluviated," *i. e.* the surface soil (the cultivable soil) was wholly washed away. In course of time, however, the waters receded and about 589 bighas of the land, including the lands in question in the suit out of which the appeal arose, gradually reappeared towards the south in 1906, and by degrees the land became hard and firm soil, capable of being cultivated in the usual manner. The appellant took possession of the said lands on the ground that by immemorial custom the middle line of the bed of the Gandak formed the boundary line between Mauzas *M* and *R*, and that, owing to the change in the course of the Gandak, the land which had re-appeared was on the southern side of the bed of the said river and belonged to the appellant as owner of Mauza *R*.

Thereupon the plaintiffs brought the suit out of which the appeal arose against the defendant and others who were in possession of the said lands, asking for a declaration that they belonged to Mauza *M* and were the property of the plaintiffs. The defendant contended that whatever alterations might take place in the course of the Gandak and whatever shiftings might occur therein the main channel of the Gandak formed the constant boundary of the Mauzas to its north and south by virtue of a clear and definite and immemorial usage, custom or usage. That defence was based upon S. 2 of Regulation XI of 1825.

The Sub-Judge found as a fact, and his finding was not challenged, that "the stream to the north of the disputed land is the stream of the Bari Gandak and it is a continuation of the Bari Gandak, which is just to the west of Mauza *M*, and it has fallen into the Ganges near about Gogri after taking a wandering course near the disputed land." He, however, decided upon the evidence against the defendant upon the question of the custom alleged, and in the result gave judgment for the plaintiffs for recovery of the said lands.

On appeal the High Court in the main affirmed the judgment below. They found the custom alleged proved, but held that the establishment of such a custom was no defence to the suit, because "the lands have not been diluviated by the Gandak and they have not been recovered from the Gandak. They were washed away by the Ganges, and have been recovered from the Ganges. A custom which regulates only questions of alluvion and diluvion by the Gandak cannot be applied to alluvion and diluvion by the Ganges."

*Held,* reversing the High Court, that, assuming that the custom alleged was proved, there was no reason for refusing to give effect to the rule laid down in S. 2 of Regulation XI of 1825 because the conditions which arose in the case were brought about by the overflow of the Ganges into the Gandak.

Whatever may have been the cause of the river Gandak becoming so swollen as to bring about the results already referred to, whether by floods or by the overflow of the Ganges into the Gandak, their Lordships cannot see anything in the Regulation which prevents the main stream of the Gandak continuing to be the boundary after the lands had been diluviated, nor do they think that such diluviation can be dissociated from the action of the Gandak.

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*Held further* that, after the existence of the custom for some years had been proved by direct evidence, it could only, as a rule, be shown to be immemorial by hearsay evidence, and that it was for that reason that such evidence was allowable as an exception to the general rule.

Appeal from a decree and judgment of the High Court at Patna, dated 21st March, 1919, varying a decree of the Court of the Subordinate Judge of Monghyr.

*L. de Gruyther, K. C.* and *S. Hyam* for appellant.

*K. Brown* for respondents.

13th May, 1925. The Judgment of the Board was delivered by

Lord Carson.

LORD CARSON :—The defendant-appellant is the owner of Mauza Rahimpur and the plaintiffs-respondents are the owners of Mauza Mansi in Pargana Farkia. The river Gandak or Bari Gandak flows between the two villages, Mauza Mansi being situated on its northern side and Mauza Rahimpur on its southern side. The river Ganges flows at some distance to the south of the Gandak. In 1899 the Ganges began its encroachment northwards and ultimately joined with the Gandak, and by the combined action of the two rivers certain of the lands which had formed part of the Mauza Mansi were " diluviated, " *i. e.*, the surface soil (the cultivable soil) was wholly washed away. In course of time, however, the waters receded and about 589 bighas of the land, including the lands in question in this action, gradually reappeared towards the south in 1906, and by degrees the land became hard and firm soil, capable of being cultivated in the usual manner. The appellant took possession of the said lands on the ground that by immemorial custom the middle line of the bed of the Gandak formed the boundary line between Mansi and Rahimpur, and that owing to the change in the course of the Gandak the land which had reappeared was now on the southern side of the bed of the said river and belonged to the appellant as owner of the Mauza of Rahimpur. Magisterial proceedings ensued, and the possession taken by the appellant was protected by an order made on the 14th December, 1908, under the Criminal Procedure Code, S. 145. An appeal against the said order was rejected on the 21st May, 1909. The present action was then brought by the plaintiffs against the appellant and others who were in possession of the said lands, asking for a declaration that they belonged to Mauza Mansi and were the property of the plaintiffs.

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The contention raised by the appellant-defendant is very clearly stated by the Subordinate Judge before whom the suit came for trial :—

"The defendant's contention," says the learned Judge, "is that whatever alterations may take place in the course of the Gandak and whatever shiftings may occur therein the main channel of the Gandak forms the constant boundary of Mauzas to its north and south by virtue of a clear and definite and immemorial usage, custom or usage. So the disputed land which is just to the south of the present flowing Gandak forms a part and parcel of Rahimpur and becomes the property of the Rahimpur Malik, the defendant No. 1."

The learned Subordinate Judge found as a fact and his finding has not been challenged that—

"the stream to the north of the disputed land is the stream of the Bari Gandak and it is a continuation of the Bari Gandak, which is just to the west of Mansi, and it has fallen into the Ganges near about Gogri after taking a wandering course near the disputed land."

The Subordinate Judge, however, decided upon the evidence, which will be dealt with later, against the appellant-defendant upon the question of the custom alleged, holding—

"that the flowing Gandak is not the constant boundary of Mansi and Rahimpur and that no such custom has been proved to exist."

In the result he entered judgment for the plaintiffs for recovery of the said lands.

From this judgment the defendant-appellant appealed to the High Court of Judicature at Patna, who, in the result, affirmed the judgment of the Subordinate Judge, making certain modifications and directions with a view to ascertaining the exact area to be delivered up

The judgment, however, of the High Court was based on entirely different considerations from those put forward by the Subordinate Judge. The learned Judges of the High Court did not agree with the Subordinate Judge, that no custom or usage had been proved. As some argument has been addressed to the Board to show that the High Court had not found the custom proved, it is necessary to set out the words upon this point used by Mr. Justice Roe, who delivered the judgment of the Court :—

"On a consideration of the Revenue Survey maps of 1837 and 1846, the Gangetic survey of 1865 and the Gadastral survey of 1887, it appears to me to be certain that there is, if not a custom of Pargana Farkia, at any rate a general usage, whereby in lands reformed by a gradual accretion on one bank of the Gandak and cut away from the other bank by diluvion the ownership of the land so accreted goes with the ownership of the bank........Now we may concede for the purpose of the argument in his case that the custom is precisely stated by Mr. Aguilar, and I myself would go further and say that upon the whole of the evidence of the plaintiff's witnesses it is certain that

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where lands are washed away and reform gradually there is a general usage upon the banks of the Gandak in this region whereby the inhabitants of one village do not cross the river to cultivate lands upon the other side, etc."

The learned Judges, however, held that the establishment of such a custom was no defence to the present suit :—

"The lands," they said, "have not been diluviated by the Gandak and they have not been recovered from the Gandak. They were washed away by the Ganges, and have been recovered from the Ganges, and this is clearly stated in paras. 4, 5 and 6 of the plaint. I cannot see that a custom which regulates only questions of alluvion and diluvion by the Gandak can be applied to alluvion and diluvion by the Ganges."

The defence of the appellant-defendant under the custom was based upon S. 2 of Regulation XI of 1825, which is in the following terms :—

"Whenever any clear and definite usage of *shekust pywust* respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage."

Assuming, as the High Court did that the custom alleged was proved, their Lordships can see no reason for refusing to give effect to this rule, because the conditions which arose in the present case were brought about by the overflow of the Ganges into the Gandak. Whatever may have been the cause of the river Gandak becoming so swollen as to bring about the results already referred to, whether by floods or by the overflow of the Ganges into the Gandak, their Lordships cannot see anything in the regulation quoted which prevents the main stream of the Gandak continuing to be the boundary after the lands had been diluviated, nor do they think that such diluviation can be disassociated from the action of the Gandak.

The real question therefore remains : was the custom proved ? was the Subordinate Judge right in his finding that there was no such custom ? or, was the High Court right in coming to the opposite conclusion, as in their Lordships' opinion they did ? Their Lordships, having carefully considered the evidence, have come to the conclusion that the finding of the High Court in this respect was right. It is unnecessary again to refer to the surveys and other documentary evidence already quoted for the judgment of the High Court. As regards the verbal evidence, which consisted of a vast array of witnesses upon both sides, whilst, as the High Court points out,

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upon the whole, even the plaintiffs' witnesses support the alleged custom, their Lordships are of opinion that the evidence called for the appellant-defendant establishes it beyond any reasonable doubt.

The Subordinate Judge, who has analysed all the evidence most carefully, quotes the witnesses for the defence who had deposed to changes of land in very many cases, and on both banks of the river, by reason of a change in the course of the bed of the river when alluvial and diluvial occurrences similar to those in the present case had occurred. He then says :—

"The instances referred to above no doubt afford cogent evidence in proof of the usage. But there is no guarantee that the gaining and the losing proprietors have acquiesced in or recognised the changes, nor is there evidence that such a state of things has continued from time immemorial. The defendant's witnesses have personal knowledge of the custom not extending over 20 years at the most, the rest is based on hearsay evidence."

Their Lordships are of opinion that the Subordinate Judge did not sufficiently consider the fact that if the changes deposed to had not been acquiesced in such want of acquiescence or recognition of the changes deposed to could easily have been tested, but in reality there was no serious challenge of the accuracy of the vast number of instances which were deposed to. It is also to be noted that the Subordinate Judge entirely omits to deal with the admission made as to the custom by the plaintiffs' own witnesses. As to the date from which the custom is said to have prevailed, after the existence of the custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the general rule. It has already been pointed out, and indeed, the contrary has not been urged before the Board, that the Subordinate Judge has found that the lands in question are formed through the changes which have taken place to the south of the river Gandak, and that being so, and the custom having been proved, it follows that the claim of the respondents to possession of the lands cannot be sustained.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, with costs, the decrees of both Courts set aside, and that the suit should be dismissed with costs.

A. de M. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Kaliakkal ... *Petitioner** (*Respondent*)

*v.*

Palani Koundan and another... *Respondents* (*Petitioners*).

Kaliakkal v. Palani Koundan.

*Civil Procedure Code, O. 9, R. 13—Applicability—*Ex parte *order directing delivery of property free from obstruction—Setting aside of—Jurisdiction of Court.*

A Court passed an *ex parte* order directing delivery of property sold at an auction to the auction-purchaser free from obstruction. Subsequently the Court set aside its *ex parte* order. *Held,* the proceedings under O. 21, Rr. 97 to 101 are execution proceedings and therefore O. 9 does not apply to the same and the Court had no jurisdiction to set aside its previous *ex parte* order.

Case-law reviewed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order, dated 30th November, 1922, of the Court of the District Munsif of Namakkal in R. E. A. Nos. 943 and 962 of 1922 in R. E. P. No. 539 of 1921 in O. S. No. 562 of 1918.

*C. S. Venkatachari* for petitioner.

*L. S. Veeraraghava Aiyar* for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.* :—The only question in this revision petition is whether O. 9, R. 13 applies to execution proceedings. The District Munsif of Namakkal passed an *ex parte* order on 26th October, 1922, directing delivery of property free from obstruction. Defendants 5 and 6 applied on 9th November, 1922, to set aside the *ex parte* order. The District Munsif has set aside the *ex parte* order and passed a fresh order. The auction purchaser who is also the decree-holder has preferred this Civil Revision Petition. The question for decision is, was the order of the District Munsif setting aside his previous *ex parte* order passed without jurisdiction ?

The answer to the question depends upon the wider question whether O. 9 applies to execution proceedings. There are several cases on the point which are not all reconcilable. In *Tirthaswami* v. *Annappayya* (1), Muthuswami Aiyar, J., held that Chapters 7 and 13 of the old Code did not apply to execution proceedings. He rested his conclusion upon the

*C. R. P. No. 679 of 1923. 19th October, 1925.

1. (1894) I L R 18 M 131.

Explanation to S. 647 of the Code of 1882. By Act VI, S. 4 of 1892 an Explanation was added to S. 647. This Explanation was enacted on account of the view held by the High Courts of Allahabad and Bombay that S. 647 corresponding to S. 141 of the present Code applied to execution proceedings. The Explanation is in these terms: "This section does not apply to applications for the execution of decrees which are proceedings in suits." The Privy Council held in *Thakur Prasad* v. *Fakir-ullah* (2) that independently of the Explanation, S. 647 did not apply to applications for execution but only to original matters in the nature of suits, such as proceedings in probates, guardianships and so forth. Muthuswami Aiyar, J. held in *Tirthaswami* v. *Annappaya* (1) that the dismissal of an execution petition did not bar a fresh application for execution. In *Balasubramania Chetti* v. *Swarnammal* (3) Benson and Sundara Aiyar, JJ. held that O. 2, R. 2 did not apply to execution proceedings. They observe at page 201: "It could not have been the intention of the Legislature to apply to execution proceedings provisions laid down with regard to suits only. The procedure to be followed in appeals and execution applications is specifically laid down in the Civil Procedure Code. S. 141 is intended to apply to other proceedings in Civil Courts, such as probate, etc." Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar followed this decision in *Somasundaram* v. *Chokkalingam* (4). In *Kajuluri Swami* v. *Sooryanarayana Razu* (5) Mr. Justice Jackson held that O. 9, R. 9 did not apply to orders passed in execution proceedings.

There are several cases which support the contention that O. 9 is applicable to execution proceedings. In *Subbiah Naicker* v. *Ramanathan Chettiar* (6), Ayling and Sadasiva Aiyar, JJ. were of opinion that O. 9, R. 13 applied to execution proceedings. The point did not directly arise in that case, but the learned Judges held "Orders in execution which come under S. 47, Civil Procedure Code, are decrees as defined in S. 2 of the Code and hence *ex parte* orders passed in execution are *ex parte* decrees, and O. 9, R. 13 provides generally for the setting aside of *ex parte* decrees and not only for the setting aside of those classes of *ex parte* decrees which are

1. (1894) I L R 18 Mad 131 at 133. 2. (1894) I L R 17 All 106 : 5 M L J 3 (PC)
3. (1913) I L R 38 Mad 199 : 25 M L J 367. 4. (1916) I L R 40 Mad. 780.
5. (1924) 47 M L J 269. 6. (1914) I L R 37 Mad 462 : 26 M L J 189.

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not also orders passed under S. 47 in execution proceedings." In *Chidambaram Chetti* v. *Theivanai Ammal*(7) the point was not decided, though Oldfield, J. in his referring order refers to the conflicting authorities on the point. The learned Chief Justice observed at page 780 : "I desire to say that our decision in this case must be taken to be confined to the particular facts of this case, that is to say, that where you have nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, the respondent cannot be taken to be estopped by reason of that non-attendance on the principle of *res judicata* from thereafter denying the liability of the property to execution." The decision in *Kali Shettathi* v. *Shama Rao* (8) relied upon by Mr. Veeraraghava Aiyar does not help him. For, in the former, the point was not decided and in the latter Oldfield and Sadasiva Aiyar, JJ. held O. 9 of the Civil Procedure Code did not apply to execution proceedings.

There is a conflict of opinion in the other High Courts also. In *Hari Charan Ghose* v *Manmatha Nath Sen* (9) Jenkins, C. J. and Ray, J. held that O. 9, R. 13, Civil Procedure Code was not applicable to a proceeding under Rules 100 and 101 of O. 21. The learned Chief Justice after going into the history of S. 647 and the reason for enacting S. 4 of Act VI of 1892 observes : "But after this alteration in the law, the Privy Council by a case, *Thakur Prasad* v. *Fakir-ullah* (2) decided on S. 647 as it stood before the Explanation was added, that the section did not apply to execution proceedings. The purpose of the Legislature in omitting that Explanation was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council." This decision is a direct authority for the contention of Mr. Venkatachariar for the petitioner that R. 13 does not apply to execution proceedings. A Full Bench of the Patna High Court in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lall* (10) held that O. 9, R. 9 did not apply to an order dismissing for default an application to set aside under O. 21, R. 90 a sale held in execution of a decree. In that case all the cases bearing on the question whether O. 9 applies to execution proceedings are collected. Though the learned Judges do not discuss in

2. (1894) I L R 17 All 106 : 5 M L J 3 (P C).
7. (1923) I L R 46 M 768 : 45 M L J 346 (F B). 8. (1916) 5 L W 124.
9. (1913) I L R 41 Cal 1. 10. (1919) 4 Pat L J 135 (F B).

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detail all the cases, they give sufficient reasons for their conclusion that O. 9 has no application to execution proceedings. In *Sheonandan Chowdhury* v. *Debi Lal Chowdhury* (11) it was held that O. 9, R. 4 of the Civil Procedure Code applied to an application under O. 21, R. 100, which had been dismissed for default. With great respect I am unable to follow the reasoning of the learned Judges. They observe at page 378 : "An application under O. 21, R. 100, is not an application in execution proceedings, but is an original matter in the nature of a suit and, in my opinion, the decision of the Judicial Committee in the case cited is an authority for the proposition that O. 9, R. 4 would apply by force of S. 141 to original matters in the nature of suits." All matters in execution are governed by O. 21. O. 21 is headed "Execution of Decrees and Orders" and applications under Rr. 97, 99, 100 and 101 are applications to the executing Court in the course of execution. It is difficult to understand why they cease to be proceedings in execution by the mere fact that the applications are made not by the decree-holder but by other persons. It is the Court which executes the decree following the procedure laid down in O. 21 that entertains applications under Rr. 97, 100 and 101. This view that after sale the proceedings in execution are not strictly execution proceedings is held by some of the learned Judges of the Calcutta High Court. In *Deljan Nichha Bibee* v. *Hemanta Kumar Ray* (12) it was held : "An application for setting aside an execution sale is not an application for execution, but in the nature of an original proceeding which is not excluded from the purview of S. 141 of the Civil Procedure Code. Such application, if dismissed for default, can be restored under O. 9, R. 9 of the Civil Procedure Code." In *Bhuban Behary Nag Mazumdar* v. *Dhirendra Nath Banerji* (13) the same view was held. In *Ramappa Chettiar* v. *Ekambara Padayachi* (14) Venkatasubba Rao, J. held : "A petition to restore a claim petition, dismissed for default of appearance of the petitioner, is maintainable and not barred by O. 21, R. 63, Civil Procedure Code."

When a decree-holder or an auction purchaser is resisted in obtaining possession of immoveable property by a person in

11. (1923) I L R 2 Patna 372.
12. (1915) 19 C W N 758
13. (1916) 20 C W N 1203.
14. (1924) 47 M L J 13.

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possession, he may make an application to the Court complaining of such resistance or obstruction under R. 97. If the executing Court is satisfied that the obstruction was caused by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and, if there is still further resistance, it may make the necessary order to enforce delivery of the property. If the Court is satisfied that the resistance or obstruction was occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application. (Rule 99). Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for possession or by the auction-purchaser, he may make an application to the Court complaining of such dispossession. If the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put in possession of the property. R. 103 gives the right to the person against whom an order is made under Rr. 98, 99 or 101 to institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit, if any, the order shall be conclusive. In considering the question whether the general provisions of the Code apply to execution proceedings, we must not overlook the fact that a right of suit is given under R. 103 to persons against whom an order is passed. In the case of parties to the decree an appeal is provided under S. 47 of the Civil Procedure Code and in the case of persons who are not parties to the decree, against whom an order is passed in execution, and in the case of the decree-holder or auction purchaser against whom an order is passed in favour of persons not parties to the decree, a suit is provided. In the face of the clear wording of R. 103 it is difficult to understand why any proceeding after the property is brought to sale should be considered as something different from execution proceedings under O. 21. On a careful consideration of all the cases I have no hesitation in holding that proceedings under Rr. 97, 98, 99, 100 and 101 are execution proceedings and therefore O. 9 does not apply to them. The order of the District Munsif setting aside an *ex parte* order was passed without jurisdiction.

The Civil Revision Petition is allowed and the order, dated 30th November, 1922, is set aside and that dated 26th October, 1922, is restored with costs throughout.

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Waller, J.

*Waller, J.* :—I agree and have nothing to add.

T. S. V. *Revision Petition allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE MADHAVAN NAIR.

Sethu Konar ... *Appellant** (*2nd defendant*)

*v.*

Ramaswami Konar ... *Respondent* (*Plaintiff*).

Sethu Konar v. Ramaswami Konar.

*Civil Procedure Code, S. 47—Party to suit—Exonerated party if and when a—His name not removed from record—Effect.*

A party who has been exonerated in the judgment in a suit but whose name has not been removed from the record of that suit must still be regarded as a party to that suit within the meaning of S. 47 of the Civil Procedure Code.

Appeal against the order of the Court of the Subordinate Judge of Negapatam in A. S. No. 117 of 1923 (A. S. No. 323 of 1922 on the file of the District Court, Negapatam) preferred against the order of the Court of the District Munsif of Tiruturaipundi in E. A. No. 230 of 1922 in O. S. No. 320 of 1918.

*R. Ganapathi Aiyar* and *N. Panchapagesa Aiyar* for appellant.

*K. S. Jayarama Aiyar* for respondent.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—O. S. No. 320 of 1918 was a suit brought by the 1st respondent upon a mortgage. The suit was decreed and the plaintiff purchased some of the suit property in Court auction. The 2nd defendant in the suit thereupon filed an application to set aside delivery of the items purchased on the ground that he had a paramount title which prevailed over the title of the mortgagor in consequence of more than 16 years' possession after the property had been surrendered to him by the owner. The District Munsif found in favour of the petitioner and directed release of the property. On appeal to the Subordinate Judge by the decree-holder purchaser, the District Munsif's order was set aside and the petition was dismissed. It is now contended that no appeal lay to the Subordinate Judge on the ground that the appellant, though made a party to the suit, was exonerated as

*A A A O No. 43 of 1924. 7th September, 1925.

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he set up a title paramount to that of the mortgagor, and consequently the decree-holder's remedy, if any, against the District Munsif's judgment was to bring a suit to set aside the order. The Subordinate Judge held that he could dispose of the appeal against the order under S. 47 as the claim petition was preferred by a party to the suit and he thought that the latest decision in *Venkataswami* v. *Chitambaram* (1) was in favour of this view. Reliance is now placed upon *Krishnappa* v. *Periyaswami* (2). The learned Judges who decided that case were inclined to the view that if a party was exonerated from a suit on the ground of misjoinder he would not remain a party to the suit for the purpose of S. 47 and that it was immaterial whether his name was actually removed from the record in pursuance of the order exonerating him. In *Venkataswami* v. *Chitambaram* (1) Sadasiva Aiyar J. and Phillips J., took the view that the plain words of the Code were intended to give legal effect to the decision of the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma* (3) and to overrule the previous decisions which had decided that a defendant whose name appears in the decree without being struck off was not a party to the suit, if he had been exonerated by the decree passed in the suit. In *Sannamma* v. *Radhabai* (4) this case is quoted in the foot-note and Abdur Rahim, J., who was one of the referring Judges, expressed a doubt as to the correctness of *Krishnappa* v. *Periyaswami* (2) and thought it required to be overruled, as it did not give sufficient effect to the plain language of the section. The decision of the Full Bench did not actually overrule *Krishnappa* v. *Periyaswami* (2) as it was not necessary to do so in order to answer the questions referred to the Full Bench. The opinion of the Full Bench was that if a person had been properly impleaded as a defendant in a suit and if the plaintiff abandoned his claim against him and the suit was dismissed as against him, such a person would still be " a defendant against whom a suit has been dismissed" within the Explanation to S. 47 of the Civil Procedure Code. In *Krishnappa* v. *Periyaswami* (2) the previous decision in *Venkatapathi Naidu* v. *Subraya Mudali* (5) was quoted with approval. This is a judgment of a single Judge given before the amendment of the Code. With due respect I am unable to follow the learned Judge

1. (1917) 23 M L T 206. 2. (1916) I L R 40 M 964 : 32 M L J 532.
3. (1900) I L R 23 Mad 361 : 10 M L J 126 (F B).
4. (1917) I L R 41 Mad 418 : 34 M L J 17(F B). 5. (1907) 17 M L J 416.

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when he says that a party against whom a claim has been abandoned is clearly not a party to the suit. The mere exoneration of a party does not have the result of making him cease to be a party. It may mean only that the plaintiff does not want a decree against him as was the case in *Ramaswami Sastrulu* v. *Kameswaramma* (3). In my opinion the ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. In *Krishnappa* v. *Periyaswami* (2) the learned Judges were evidently impressed with the anomaly that might arise out of the Court having to decide in execution proceedings questions which it had refused to determine in the suit. That might be the consequence of exonerating a person who had a superior title to the principal defendant; but the obvious remedy would be for the Court to adopt the procedure provided in S. 47 of treating the petition in execution as a suit and trying it in the regular manner if it had not already taken the simpler course of removing the party from the record under O. 1, R. 10 (2) at an earlier stage. As the appellant in the present case was a party to the suit and the final decree merely states that he is exonerated without removing his name from the record, I think that his remedy lay only by a petition under S. 47, which was the course he adopted, and as the Subordinate Judge has decided against his claim on a question of fact, no second appeal will lie. The appeal is dismissed with costs of the respondent. We direct each party to bear his own costs in the Courts below.

Madhavan Nair, J.

*Madhavan Nair, J.* :—I agree. In *Ramaswami Sastrulu* v. *Kameswaramma* (3) it was decided that the defendant, in whose favour a suit is dismissed, he being exonerated from the suit, must be regarded as a party to the suit within the meaning of S. 244 of the old Code. The Explanation to S. 47 of the present Code, *viz.*, "For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit" gives effect to this decision; an appeal, therefore, clearly lies in the present case. The question raised before us was, no doubt, left open in the Full Bench decision reported in *Sannamma* v. *Radhabai* (4). But it appears

2. (1916) I L R 40 M 964: 32 M L J 532.
3. (1900) I L R 23 M 361: 10 M L J 126 (F B).
4. (1917) I L R 41 M 418 : 34 M L J 17 (F B).

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to me that the opinion of the learned Chief Justice is to the effect that, in cases of this description, unless a party's name has been struck out and removed from the records, he would remain "a party to the suit". That has not been done in this case and, therefore, though the 2nd defendant (appellant) has been exonerated in the judgment, in my opinion, he must still be regarded as a party to the suit within the meaning of S. 47, Civil Procedure Code.

As the other question raised is one of fact, I agree that this Civil Miscellaneous Second Appeal should be dismissed with costs.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Nidavolu Atchutam *alias* Atchutaramayya and others... *Appellants** (*Defts.* 3 *to* 5)

*v.*

Ratnaji, carrying on business under the name and style of Ratnajee Bhootaji and two others ... *Respondents* (*Plaintiff and Defendants* 1 *and* 2).

Atchutam v. Ratnaji.

*Hindu Law—Father—Debt of—Son's pious obligation to pay—Applicability of rule to commercial debts.*

The pious obligation of a Hindu son to pay his father's debts extends to commercial debts A Hindu son is therefore liable for debts contracted by his father in the conduct of a hardware trade started by him.

Appeals against the decree of the Court of the Additional Subordinate Judge of Rajahmundry in O. S. No. 25 of 1920 (O. S. No. 16 of 1919 of the District Court, Godavari) and O. S. No. 24 of 1920 (O. S. No. 8 of 1923 of the District Court, Godavari).

*A. Satyanarayana* for appellants.

*G. Lakshmanna* and *V. Viyyanna* for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—In this case the father of the appellants embarked on hardware trade in 1914 and was sued along with them in respect of debts contracted

*Appeals Nos. 436 of 1922 and 362 of 1923. 22nd October, 1925.

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by him in the conduct of that venture. The appellants' vakil relied on a text of Gautama XII. 41, which runs as follows :—

> "Money due by a surety for a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or in gambling, and a fine shall not involve the sons of the debtor"

and the bold contention is put forward that the pious obligation does not extend therefore to commercial debts. I have discussed this subject at length in paragraph 303 of the 9th Edition of Mayne on Hindu Law and I have very little to add to what I said there. This Court has held in *Thangath Ammal* v. *Arunachalam Chettiar* (1) that sons are liable in a case of a surety bond executed by the father for payment as distinct from obligations as a surety for appearance and for honesty; and there are other decisions of the Calcutta and Patna Courts to the same effect. This appears to me to be based upon the view that governing the provision in the texts is that which excludes from the rule debts that are not *vyāvaharika,* an expression taken from Usanas (*apud* Mitakshara, II. 48) and Vyasa (*apud* Jagannatha, I. v. 203). From 1874 onwards the decisions of the Privy Council have adpoted this view and have crystallised the translation as "illegal or immoral". It appears in *Girdhari Lal* v. *Kantoo Lal* (2) and has been repeated in many subsequent cases. If this be correct, it will follow, as I have said, that the particular instances given in the Smritis must be treated as a mere expression of opinion on the part of the authors as to what classes of debts would fall under the general words. A modern Court would, therefore, be free in interpreting the general term to consider the particular instances given as obsolete under the conditions of to-day. I am clearly of opinion that commercial debts fall into this category and that we ought to say that the pious obligation extends to them. It may well be that in the time of Gautama it was thought that to engage in trade was degrading, at any rate in the case of the higher castes. No one could pretend that that view would be entertained to-day. For these reasons I am of opinion that the sons are liable in this case and that the appeals must be dismissed with costs.

Of course the whole of the pious obligation is itself a relic of antiquity based originally on a religious and not a legal conception but it has been controlled and moulded into

1. (1918) I L R 41 M 1071: 35 M L J 229.
2. (1874) L R 1 I A 321.

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Viswanatha Sastri, J.

shape by a series of decisions which, in my opinion, make it a working rule which in its actual application is neither inconvenient nor unjust.

*Viswanatha Sastri, J.*:—*Appeal No.* 436 *of* 1922 :— Appeal by defendants 3 to 5 against the decree of the Court of the Additional Subordinate Judge, Rajahmundry, in O. S. No. 25 of 1920.

Appellants are the sons of the first defendant, and the second defendant is their maternal uncle. The suit was laid for the recovery of a sum of money (Rs. 6,898-11-6) due in respect of money dealings between defendants 1 and 2 and plaintiff. Defendants 1 and 2 are said to have carried on in partnership a trade in hardware for the purpose of which money was being borrowed from time to time from plaintiff. It was also alleged that the 1st defendant and defendants 3 to 5 were undivided, and that the trade was being carried on by the 1st defendant for the benefit of the family. Defendants 3 to 5 contended that as they had become divided from their father (1st defendant) they had nothing to do with the trade ; that the trade was never an ancestral trade nor a joint family trade; and that they were not liable. They also contended that the settlements of account alleged in the plaint, between plaintiff and defendants 1 and 2, were false. The Subordinate Judge held that the settlements of account were true, that the partition set up was brought about to defraud creditors and he passed a decree against defendants 1 and 2 and against the joint family properties in the hands of defendants 3 to 5.

The contentions urged in appeal are :—(1) That the trade not being an ancestral trade, and the 1st defendant having started it only in 1914, appellants could not be held liable for sums said to have been borrowed for the purposes of the trade; and (2) that as Rs. 1,926-6-3 and Rs. 695-3-0 were due from third persons, and as the partnership took them over, they (defendants 3 to 5) were in any event not liable for these sums. The contention that defendants 3 to 5 had separated themselves from their father was not pressed before us.

Taking the second contention first, the allegation in para. 6 of the plaint is that on January 5, 1918, defendants 1 and 2 "made themselves liable in the sum of Rs. 1,926-6-3 for the share of E. Venkatasubbarayudu in the *katha* debt due by him and another K. Venkatanarayana Row; and the

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pronote debt of the said E. Venkatasubbarayudu in the sum of Rs. 695-3-0." In the case of a suretyship for payment, it may be taken as well settled that a Hindu son is liable. See *Sitaramayya* v. *Venkatramanna* (3), *Thangath Ammal* v. *Arunachalam Chettiar* (1); *Tukaram Bhat* v. *Gangaram* (4) and *Rasik Lal Mandal* v. *Singheswar Rai* (5). The decision in *Narayan* v. *Venkatacharya* (6) relates to the liability of a grandson and has no application to the case before us. The text of Gautama (S. 41) was referred to by the vakil for the appellants, but it appears to me that Gautama simply repeats Manu (S. 159) and that he refers only to a suretyship for appearance. In the case of a suretyship for payment, the text of Yajnavalkya recognises the liability of a son. This contention therefore cannot prevail.

Coming to the first contention it was urged that the father was not continuing any ancestral trade but was starting a new trade, and that for debts contracted for a new trade, the sons were not liable. That under ancient texts a son was under a legal obligation to pay his father's debts was the opinion held by that eminent Judge (Muthuswami Aiyar, J.) in *Ponnappa Pillai* v. *Pappuvayyangar* (7). According to Yajnavalkya if a father be long absent in a distant country or be dead the debt must be repaid by the son. It is equally well settled that the son was not under any such liability in the case of debts contracted for illegal or immoral purposes. According to Yajnavalkya a son was not bound to pay a debt, even though hereditary, if it was contracted for the purpose of drinking, debauchery or gambling. According to Gautama a son was not bound to discharge a debt incurred by his deceased father if due by him to a wine shop or a gambling saloon. "By the Hindu Law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt." See *Hanooman Persaud Pandey* v. *Mussumat Babbooee Munraj Koonwaree* (8). In *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (9) their Lordships of the Privy Council refer in the appeal to the following dictum of Westropp, C. J., in the case of *Udaram Sitaram* v. *Ranu Panduji and Venku Panduji* (10) "subject to certain limited exceptions

1. (1918) I L R 41 Mad 1071 : 35 M L J 229 3. (1888) I L R 11 Mad 373
4. (1899) I L R 23 Bom 454. 5. (1912) I L R 39 Cal 843.
6. (1904) I L R 28 Bom 408. 7. (1881) I L R 4 Mad 1 at 18 (F B).
8. (1856) 6 M I A 393 at 421. 9. (1879) I L R 5 Cal 148 at 169 (P C).
10. (1875) 11 Bom H C R 76 at 83.

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(as, for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

In the case before us the trade the father carried on was a trade in hardware and there was nothing illegal or immoral about it. There is not even any suggestion to this effect in the written statement and all that is alleged is that the business was neither an ancestral nor family business ; that the sons had become divided from their father ; and that the business was carried on by the father for his sole benefit. The finding is that the business was carried on for the benefit of the family and that the partition was fraudulent. In *Ramkrishna Trimbak* v. *Narayan* (11) it was held that a son cannot escape liability for payment of the debts of his father contracted in fish trade. The decision in *The Official Assignee of Madras* v. *Palaniappa Chetty* (12) is no authority for the proposition that where a Hindu father starts for the first time a new trade, and for the purpose of the trade contracts debts his sons cannot be held liable for the debts so contracted. In that case the question arose in bankruptcy proceedings whether a Hindu son can be adjudicated insolvent in respect of debts incurred in a business newly started by his father during his minority, and in which he actively participated after attaining majority, and there was no question as to the liability of joint family properties for such debts.

I would therefore dismiss the appeal with costs.

*Appeal No.* 362 *of* 1923:—Appeal by defendants 2 to 4 against the decree of the Court of the Additional Subordinate Judge of Rajahmundry in O. S. No. 24 of 1923.

Appellants are the sons of the 1st defendant, and the suit was laid for the recovery of a sum of money (Rs. 3050) due in respect of money dealings carried on between plaintiff and 1st defendant. It was alleged that the dealings were for the purpose of financing a trade in hardware which 1st defendant was carrying on for the benefit of the undivided family consisting of himself and his sons. Appellants contended that they had become divided from their father; that the trade was not an ancestral trade; and that it was never carried on for their benefit. The Subordinate Judge held that the dealings were proved ; that the partition was brought

11. (1915) I L R 40 Bom 126.
12. (1918) I L R 41 Mad 824 : 35 M L J 473.

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Viswanatha Sastri, J.

about to defraud creditors; and that the joint family properties were liable.

The contention urged in appeal is that the trade not being an ancestral trade and the 1st defendant having started it only in 1914, appellants could not be held liable for sums said to have been borrowed for purposes of the trade. The contention that they had separated from their father was not pressed before us.

This appeal was heard with Appeal No. 436 of 1922, and for reasons given in my judgment in that appeal, I would dismiss the appeal with costs.

A. S. V. *Appeals dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

N. K. Govindan Nair ... *Petitioner** (*Counter-petitioner*)

*v.*

Kanhirathotikayil Ithalutty ... *Respondent* (*Petitioner*).

Govindan Nair v. Ithalutty.

*Court Fees Act, S. 7 (1)—Kanom—Redemption of—Suit for—Claim by plaintiff to deduct from kanom amount certain damages claimed by him—Court-fee in case of.*

Where, in a suit to redeem certain land granted in *kanom*, the plaintiff sought to deduct from the *kanom* amount certain damages to which he claimed to be entitled, *held* that the plaintiff must pay Court-fee on the *kanom* amount and also an *ad valorem* fee on the amount claimed as damages.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional District Munsif of Calicut in I. A. No. 1123 of 1924 in O. S. No. 286 of 1923.

*K. P. Ramakrishna Aiyar* for petitioner.

*A. Parameswara Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—Petitioner is plaintiff in O. S. No. 286 of 1923 on the file of the Court of the Additional District Munsif of Calicut. He sues to redeem certain land granted on *kanom*, and seeks to deduct from the *kanom* amount certain damages to which he claims to be entitled. The question is whether he need pay Court-fee only on the *kanom* amount, or whether, as held by the Lower Court, he must also pay an *ad valorem* fee on the amount claimed as damages.

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*C R P No. 30 of 1925 and C M P No 3199 of 1925. 8th September, 1925.

Govindan Nair *v.* Ithalutty.

The petitioner relies upon *Eacharan Pattar* v. *Appu Pattar* (1), but there it was simply a question of taking an account of rents due on the original contract. Here, there is the additional cause of action that defendant committed a tort. *Reference under Court Fees Act, S. 5* (2) is also a question of rents. I do not think that petitioner can draw any useful analogy between improvements and damages. Improvements are specially provided for in Madras Act (I of 1900) and it was early held that they would not affect the Court-fee. [*Zamorin of Calicut* v. *Narayana* (3)]. I find no authority for extending this principle to damages; and it cannot be said to be intended by the phrase "or otherwise" in S. 6(2), Madras Act (I of 1900).

The petitioner also contends that this is a mortgage suit in which any question of damages must necessarily be only one of account. The only authority he can cite is the observation in *Ragavaji Sait* v. *Annamalai Mudali* (4) (which was not a mortgage suit but a suit between principal and agent): " Even if this suit be regarded as a suit for damages based on fraud and not as a suit for account. " I agree with the Lower Court that when damages are sued for, S. 7 (1) of the Court Fees Act must apply, and redemption and damages are two distinct subjects as contemplated by S. 17.

The petition is dismissed with costs.

*Note* :—The petitioner says that he relied upon *Parasurama Pattar* v. *Venkatachalam Pattar* (5), *Thekkemannengath Raman* alias *Kunchu Poduval* v. *Kakkesseri Pazhiyot Manakkal Karnavan* (6) and not upon *Ragavaji Sait* v. *Annamalai Mudali* (4). These two cases deal with the point whether (1) a claim for rent, (2) a claim for damages for breach of contract are barred at the time of redemption. I did not and do not consider that these rulings affect the question.

A. S. V. *Petition dismissed.*

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1. (1895) I L R 19 Mad 16.
2. (1891) I L R 14 Mad 480.
3. (1882) I L R 5 M 284 (F B).
4. (1907) 17 M L J 625.
5. (1913) 25 M L J 561.
6. (1915) 28 M L J 184.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Pattannayya ... *Appellant**

*v.*

Pattayya *alias* Krishnayya Shanbhaga ... *Respondents (Plaintiffs 2 to 4 and 6).*

Pattannayya *v.* Pattayya.

*Limitation Act, Arts.* 181, 182—*Execution application—Disposal—Proper mode—Order recording execution application—Effect—Subsequent application for execution—Limitation—Art.* 182 (2)—*Joint decree—What amounts to a.*

An application for the execution of a decree for possession of certain items of property was filed on 11th March, 1915 and was within time. The Court ordered delivery of the properties to the decree-holders on 21st July, 1915. Third persons objected to the delivery. The objection was removed and item 3 was delivered to them on 27th March, 1916 and the Court passed an order on that day "the third item was delivered to the petitioners and the petition was recorded." A suit was filed by the obstructors and a temporary injunction was granted against the delivery of item 2. The suit was ultimately dismissed on 18th December, 1916 and consequently the temporary injunction ceased to be in force from that date. The decree-holders filed an execution application on 3rd September, 1921 and prayed for delivery of item 2. It was contended that that application having been filed nearly 6 years after the application of 1915 and even more than 3 years after the removal of the obstruction, was barred.

*Held,* that the application of 1915 was, on the date of the application of 3rd September, 1921, on the record of the executing Court, that the application of 1921 was therefore neither a further application for execution nor an application to revive that of 1915 but was only intended to call the attention of the executing Court to the fact that the application of 1915 had to be proceeded with, and that the application of 1921 was therefore not barred.

Where the relevant portion of a decree was as follows: "Plaintiffs do recover from the defendants 9 and 10 possession of the plaint property with buildings thereon described below; plaintiffs do recover from the 9th defendant future rental, etc., and plaintiffs do recover from the 10th defendant future rental, etc." *held,* that the decree was a joint decree, and that an application for execution filed against the 9th defendant was sufficient to keep alive the decree against the 10th.

*Per Devadoss, J.* :—There is no provision of law by which the executing Court should lodge an execution petition, or record it, or strike it off for what is commonly called the statistical purposes.

A decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly.

Appeal under cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Jackson in A. A. A. O. No. 38 of 1923 preferred against the order of the Court of the Subordinate Judge of South Kanara in Appeal Suit No. 7

*L P A No 106 of 1924. 9th October, 1925

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of 1922 (A. S. No. 100 of 1922 on the file of the District Court) preferred against the order of the Court of the District Munsif of Udipi in R. E. P. No. 704 of 1921 in O. S. No. 77 of 1903.

*T. M. Krishnaswami Aiyar* and *K. P. Sarvothama Rao* for appellant.

*K. Srinivasa Rao* for *B. Sitarama Rao* for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.*:—The only question in this appeal is whether the decree-holders' application for execution is barred by limitation. The facts are briefly these: The respondents herein obtained a decree in O. S. No. 77 of 1903 on 28th September, 1903. It is admitted that the application for execution in R. E. P. No. 323 of 1915 on 11th March, 1915, was within time. The Court ordered delivery of the properties to the decree-holders on 21st July, 1915. Third persons objected to the delivery. The objection was removed and item 3 was delivered to them on 27th March, 1916, and the Court passed an order on that day: "The 3rd item was delivered to the petitioners and the petition was recorded." A suit was filed by the obstructors and a temporary injunction was granted against the delivery of item 2. The suit was ultimately dismissed on 18th December, 1916 and consequently the temporary injunction ceased to be in force from that date. The respondents filed an execution application on 3rd September, 1921, and prayed for delivery of item 2 from the 10th defendant. Both the Lower Courts dismissed the application as being barred by time and Jackson, J. held in C. M. S. A. No. 38 of 1923 that the application was within time. Hence this appeal by the 10th defendant.

The first contention is that the present application filed nearly six years after the application of 1915 is barred by limitation and it is urged that if this application is to be treated as an application to revive the execution application of 1915, it should have been filed within three years of 18th December, 1916 when the obstruction to execution was removed. The order of the District Munsif on the application of 1915 is "the third item was delivered to the petitioners and the petition was recorded." The question is whether this order amounts to a dismissal of the application. The present Code of Civil Procedure does not contemplate the passing of such an order. When an execution application is filed, if

it is in order, it has to be disposed of on the merits; if it is barred by limitation or if the decree has been satisfied, or if the applicant is not the decree-holder's assignee or his legal representative, or if the decree-holder does not help the Court in executing the decree, or omits to do anything which the Court directs him to do, the application will have to be dismissed unless for proper reasons the Court adjourns the application. If the decree-holder is not able to do a thing directed to be done within the time allowed by the Court, the Court has to give him further time. There is no provision of law by which the executing Court could lodge the petition or record it, or strike it off for what is commonly called the statistical purposes. The executing Court is bound to follow the procedure laid down in the Code and it cannot dismiss the application for the reason that it is long pending. If there is obstruction to the execution of the decree, the Court ought to adjourn the petition till the removal of the obstruction. It does not matter how long the obstruction continues. If a temporary injunction is issued against a Court executing a decree, the Court should stay its hands till the injunction is dissolved or till the suit in which it is granted is disposed of. If a permanent injunction is granted against the execution of the decree, then the application for execution will have to be dismissed. If the executing Court adjourns the petition from time to time it will enable the decree-holder to inform the Court as to the progress of the suit or proceeding in which the temporary injunction is granted and as soon as it is informed that the obstruction has been removed the Court should proceed to dispose of the application according to law. It is to prevent dilatory proceedings and the long pendency of execution applications that O. 21, R. 57 has been enacted. It lays upon the decree-holder the duty of helping the Court to execute the decree in his favour and if by reason of the decree-holder's default the Court is unable to proceed further with the execution application, it shall either dismiss the application or, for sufficient reasons, adjourn the proceedings to a future date. Upon the dismissal of such an application the attachment shall cease. Under the old Code if the properties were once attached and the application for execution was subsequently dismissed, the attachment did not necessarily cease to have effect. If, instead of following the procedure laid down by the Code, the executing Court orders that the

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petition be lodged or recorded, or be struck off, such an order is not one sanctioned by the Code and it only amounts to this: petition is adjourned *sine die.* In this view the petition of 1915 is still on the record of the executing Court and the petition of 1921 is not a further application for execution, nor is it an application to revive that of 1915, for that is still on the file and no application is required to revive an application which is pending. It is an incorrect use of the language to speak of reviving a petition which has not been dismissed. If the application has been improperly dismissed an application would be necessary to revive it, *viz.*, where the dismissal is not on the merits or for the default of the decree-holder but for statistical purposes or on account of obstruction which would take time to remove. As the application of 1915 is still pending the application of 1921 was only intended to call the attention of the executing Court to the fact that the execution application had to be proceeded with. The argument that if a Court lodges or records an execution application it should be regarded as pending there will be no time-limit for asking the Court to proceed with it obviously overlooks the fact that it was not the decree-holder that stood in the way of the execution being proceeded with but that the Court kept the matter pending without taking the necessary steps. When a Court keeps a matter pending, a party should not suffer by reason of the dilatoriness of the Court or by an action of the Court not sanctioned by the law. The remedy to prevent long pendency of applications for execution is to adjourn the applications from time to time, and to have them brought up for orders. If that is done, the Court would be in a position to know whether the execution could be proceeded with or not, and as soon as the obstruction is removed the Court would be able to proceed with the execution according to law.

Great reliance is placed by Mr. T. M. Krishnaswami Aiyar on *Suppa Reddiar* v. *Avudai Ammal* (1), where a Full Bench of this Court held that if an execution application is improperly dismissed a subsequent application to revive or continue the application is governed by Art. 178 of the old Limitation Act corresponding to Art. 181 of the present Act. This case is distinguishable from the present, for here the application of 1915 was not dismissed. In *Chalavadi Kotiah* v. *Poloori Alimelammah* (2), the executing Court dismissed an

1. (1904) I L R 28 M 51: 14 M L J 401 (F B).
2. (1907) I L R 31 M 71: 18 M L J 46.

execution application without notice to the parties on the ground that the execution had been stayed by the order of the District Court. Miller and Munro, JJ. held that the order of dismissal amounted to no more than a direction to the officers of the Court to remove the proceedings from the pending list, and observed at page 76 :—

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"That so long as proceedings initiated by the decree-holder are pending, his right to apply for their continuance accrues from day to day, *i. e.*, on every day on which the Court does not *suo motu* continue them. The right to apply will then not be barred till three years have elapsed after the proceedings have ceased to be pending."

In *Subba Chariar* v. *Muthuveeran Pillai* (3) Benson and Abdur Rahim, JJ. follow the decision of Miller and Munro, JJ. in *Chalavadi Kotiah* v. *Poloori Alimelammah* (2). The principle of these cases is that if an execution application is pending, a subsequent application is not an application under Art. 181 but an application asking the Court to continue the proceedings in a pending application. The decision in *Ayissa Umma* v. *Puthiyapurayil Kannachamkandi Abdulla* (4) to which one of us was a party is in point. It was held in that case that an order of dismissal of an execution petition for statistical purposes did not amount to a dismissal of the petition but that the petition should be considered as pending. I hold that the application of 1915 is still pending, and therefore there is no bar to its being proceeded with.

In this connection I must express my strong disapproval of the practice of striking off or lodging an execution application for statistical purposes. The sooner it is stopped the better it would be for the parties as well as for the Courts executing decrees.

The next point urged is that the decree is not a joint decree and therefore the application of 1918 and of 1920 for execution against the 9th defendant do not save the bar of limitation so far as the 10th defendant is concerned. In view of my decision on the first point it is unnecessary to deal with this point at length. The relevant portion of the decree is as follows :—

"Plaintiffs do recover from defendants 9 and 10 possession of the plaint property with buildings thereon described below ; plaintiffs do recover from the 9th defendant future rental, etc., and plaintiffs do recover from the 10th defendant future rental, etc."

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2. (1907) I L R 31 M 71: 18 M L J 46.
3. (19**) I L R 36 M 553 : 25 M L J 545.
4. (1923) M W N 670.

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The argument is that inasmuch as the decree directs the 9th and 10th defendants to pay mesne profits severally, it is not a joint decree but a several decree, and the application for execution against the 9th defendant cannot be treated as an application in a joint decree. Where a defendant is directed to pay a certain sum to plaintiff and another defendant is directed to pay a similar sum or a different sum to the plaintiff, the decree is not a joint decree; but where a decree directs that *A* and *B* shall pay a certain sum to the plaintiff and further directs that *A* should pay another sum and that *B* should pay another sum and that *A* and *B* should bear their own costs, the decree is a joint decree against *A* and *B*. The decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly even though some other reliefs may be given against each defendant separately. Explanation 2 to Art. 182 of the Limitation Act is in these terms :—

"But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all."

This Explanation should be literally interpreted and according to its terms the present decree is a joint decree. In *Subramania Chettiar* v. *Alagappa Chettiar by Agent Palaniappa Chettiar* (5) it was held that where a decree awards mesne profits against *A* and *B* jointly and costs jointly against *A*, *B* and *C*, an application to execute the decree for mesne profits against *A* and *B* keeps alive the right to execute the decree for costs against *C* under part 2 of paragraph 2; Explanation 1 to Art. 179 of Sch. II to the Limitation Act. This case was followed by a Bench of the Calcutta High Court in *Baroda Kinkar Chowdhury* v. *Nabin Chandra Dutta* (6). The facts of that case are very similar to those of the present. The decree in this case is a joint decree and the present application against the 10th defendant is not barred by limitation by reason of the applications of 1918 and 1920. I find this point against the appellant.

In the result the Letters Patent Appeal is dismissed with costs.

Waller, J.

*Waller, J.*:—On the first point I agree that, on the authorities no other conclusion is possible, though the position does seem to me to be highly unsatisfactory. If the decree-holder had presented an application directly after the close of the

5. (1906) I L R 30 M 268. 6. (1909) 11 C L J 83.

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intervening litigation (as he should have been forced to do) and that application had been dismissed early in 1917, his present application would have been long out of time. Having done nothing to prosecute his first application for six years, he is, on the authorities, still in time.

Something should, of course, be done to put an end to this method of adjourning execution applications *sine die*. If they are held up by some other proceedings, they should be adjourned either for definite periods of six months each, or till the date of the closing of the other proceedings.

On the second point also I agree.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

E. Rajagopalachariar ... *Appellant* (Plaintiff)*

*v.*

Sami Reddi and others ... *Respondents (Defendants Nos. 57, 59 and 60).*

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*Hindu Law—Widow—Debt—Payment out of income—Obligation as regards—Limited owner—Property inherited by—Alienation of, for marriage of one of her sons—Validity—Next reversioner's consent to alienation at the time—Effect on his right to contest —Validity of alienation—Estoppel—Ancestral property—Alienation by father for marriage of one of his sons—Validity.*

Where a woman inherits considerable property as a limited owner she is not entitled to charge the reversion with debts contracted by her when she could have met those debts from the income of the property. But where the income is not sufficient for her own maintenance or for other purposes which would be considered "necessity" under the Hindu Law, a limited owner can alienate the property to the prejudice of the reversion.

A daughter who inherits the property of her father is not entitled to alienate the same for the purpose of getting one of her sons married.

*Semble* : A Hindu father cannot alienate ancestral property for the purpose of getting any of his sons married.

Where a limited owner mortgaged the property inherited by her for a purpose which would not make the mortgage binding on the reversion, and that purpose was expressly recited in the mortgage deed, and the mortgagee was fully aware that the money was borrowed for that purpose, *held*, that the next reversioner was not estopped from contesting the validity of the mortgage by the mere fact that he consented to the transaction at the time when it took place.

Second Appeal against the decree of the District Court of Chingleput in A. S. Nos. 295 and 296 of 1920 preferred against the decree of the Court of the Subordinate Judge of

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*S. A. No. 1548 of 1922. 1st May, 1925.

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Chingleput in O. S. No. 7 of 1919 (No. 57 of 1918, District Court).

*K. Bhashyam Aiyangar* for appellant.

*A. Viswanatha Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff's suit is for possession of one-fourth share of the family property and for a declaration that certain alienations are invalid. In this appeal the property in dispute is comprised in Sch. B to the plaint. The District Judge has dismissed the plaintiff's suit so far as the B Schedule property is concerned. The plaintiff has preferred this second appeal.

The first point raised by Mr. Bhashyam for the appellant is, that what was sold to the 58th defendant under his mortgage decree was only the life-interest of the plaintiff's mother. In support of that contention he relies upon Ex. E-3 which is a statement put in by the 2nd defendant in O. S. No. 34 of 1901, who was the mortgagee decree-holder, and who brought the property to sale under his mortgage decree obtained against the plaintiff's mother Alamelammal. One of her sons brought a suit for a declaration that the property was the property of his father and the alienation by the mother was not binding upon him and upon his brothers. After the written statements were put in, the 2nd defendant, the decree-holder, consented to having the properties sold without prejudice to the rights of the plaintiff. The argument advanced by Mr. Bhashyam is that the mortgagee decree-holder by putting in this petition consented to have only the life-interest of the mother sold in execution of his decree. His contention is not supported by the pleadings in the case. Unfortunately the plaint in O. S. No. 34 of 1901 has not been filed in this case, but there is the statement of the 1st defendant, the mother, Ex. E-1, from which it is clear that the plaintiff contended that the property was the property of the father and not that of the mother, and the plaintiff did not set up the contention that even if the property was the property of the mother, she only had a daughter's interest and, therefore, what could be sold was only her life-interest. In paragraph 1 of Ex. E-1 the 1st defendant Alamelammal says : "The suit property belongs to the 1st defendant. The plaintiff has no concern and enjoyment whatever therein. It is not even the plaintiff's ancestral property. The 1st defendant got it ancestrally and is enjoying it with patta from

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1858." Paragraph 2 makes the matter clear: "The plaintiff's father instituted a suit in O. S. No. 452 of 1898 in the District Munsif's Court, Chingleput, against this defendant for recovery of the suit property and some other property. It was decided that the property belonged to this defendant and the plaintiff's suit has been dismissed." In the light of the pleadings in O. S. No. 34 of 1901 it cannot be said that the plaintiff and his brothers put forward the case that the mother was only entitled to a life-interest as a daughter and they were entitled to the reversion. In the absence of such a contention in the pleadings and in the absence of an issue to that effect it cannot be said that the 2nd defendant consented to selling only the life-interest of the 1st defendant Alamelammal. What he says in Ex. E-3 is, "If there be any right for the plaintiff in the aforesaid properties, I consent to have the auction sale effected without going against that right." The meaning of that sentence is, that if the plaintiffs have any claim to the property, that is, as being their ancestral property, such a right would not be affected by the auction sale. It cannot by any process of ingenious reasoning be contended that by Ex. E-3 the 2nd defendant consented or agreed to have only the life-interest of the mother sold in auction.

The property was purchased by the mortgagee who was the 58th defendant in the present suit. He was in possession from the date of the sale. Alamelammal, the mother of the plaintiff died in 1918. The plaintiff, her third son, has brought this suit for a share of his mother's property and for a declaration that the alienation made by her in favour of the 58th defendant is invalid and is not binding upon him. Ex. XX is the deed of mortgage which was executed on the 7th July, 1896, by Alamelammal in favour of Vijiaraghavachari, 58th defendant. The consideration for the mortgage, Rs. 250, was received for the marriage of her son Jagannathachari. This sum, not having been paid, the mortgagee brought a suit and obtained a mortgage decree, and brought the property to sale. The contention of the appellant is that this mortgage is not binding upon the reversion. It is urged that the mother had considerable property and she could have paid off the mortgage amount out of the income of the property and reliance is placed upon *Jiban Krishna Roy* v. *Brojo Lal Sen* (1) and *Rameswar Mandal* v. *Provabati Debi* (2). Where a

1. (1903) I L R 30 C 550 (P C).
2. (1914) 20 C L J 23.

woman inherits considerable property as a limited owner she is not entitled to charge the reversion with debts contracted by her when she could have met those debts from the income of the property. But where the income is not sufficient for her own maintenance or for other purposes, such as pilgrimage to holy places, gifts for the repose of the soul of the person from whom she inherits her property or for other purposes which would be considered 'necessity' under the Hindu Law, a limited owner could alienate the property to the prejudice of the reversion. But where ample funds are in her hands for meeting her own expenses and for all other expenses incidental to the ownership of property, such as payment of cist or rent, she is not entitled to charge the property with her debts to the prejudice of the reversion. In this case the debt was contracted for the marriage of one of her sons. The purpose for which the loan was contracted is clear from the document itself, and it is not suggested either by the plaintiff or by the defendant that the debt was borrowed for any other purpose. The question, therefore, arises whether a limited owner is entitled to charge the reversion with a debt contracted for the purpose of the marriage of her son. No authority is shown for the position that a mother could alienate the property inherited by her own father for the purpose of getting one of her sons married. Mr. Viswanatha Aiyar's contention is that there is a moral obligation to get her son married and therefore she is entitled to borrow for the purpose of getting her son married. There is no obligation under the Hindu Law on the part of a mother to get any of her sons married. The case of a daughter stands on a different footing altogether. It is one of the duties of the father to get his daughter married and settled in life, and in the case of the twice-born the girl has to be married before she attains puberty and therefore the Hindu Law lays the obligation upon the father of getting the girl married, and in order to do so the father is entitled to alienate ancestral property and the sons cannot question his act. But no such obligation is laid upon the father to get any of his sons married and I am not aware of any authority in which it was held that a father could alienate ancestral property for the purpose of getting any of his sons married. In the case of a mother there is no obligation at all to get any of her sons married by borrowing money on the security of the property inherited by her from her father. In *Rustom*

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*Singh* v. *Moti Singh* (3) the alienation by the mother was held to be good on the ground that the father was too poor to provide for the marriage of the daughter, and the mother was obliged to find the money for celebrating the marriage of the daughter. This is quite in consonance with the principle of Hindu Law that a daughter should be married before she comes of age and it is the duty of the father to see that she is married. If the father is too poor to do his duty, the mother could, under the circumstances, alienate her property for the purpose of getting the girl married. This would not support the contention of the respondent that the mother could also do the same thing for the son. In *Narainbati Kumri* v. *Ramdhari Singh* (4) it was held that a grandmother could not alienate her property for the purpose of celebrating the marriage of her daughter's daughter for there is no duty at all on her to get her grand-daughter married. No doubt natural affection might prompt her to do so ; but if she wants to get the girl married she must do it out of the income of the property and she could not encumber the reversion with a debt for such a purpose. As observed by Sharfuddin, J. at p. 85. "Merely because Adyabati remained with her grandmother Anupbati, it is no ground according to Hindu Law to charge the estate of Kamla Prasad with the cost of her marriage. It may be a moral duty to see that this girl was properly married but I am not convinced that this can at all be considered as legal necessity of a nature that would bind the estate."

In *Bai Mangal* v. *Bai Rukhmini* (5) it was held that a married daughter had no claim for maintenance upon the father. There is, therefore, no justification for Alamelammal to borrow money on the security of the property for celebrating the marriage of her son.

The next contention advanced by Mr. Viswanatha Aiyar for the respondent is, that the plaintiff was a consenting party to the transaction evidenced by Ex. XX. The money was borrowed for the marriage of his brother and therefore the plaintiff is estopped from contesting the validity of the transaction. In order to establish estoppel it is necessary to make out that a representation was made by a person, and the other party to the representation believed that representation to be true and acted upon it to his prejudice. If no representation was made or if the other party did not believe in the represen-

3. (1896) I L R 18 All 474. 4. (1916) 1 Pat L J 81.
5. (1898) I L R 23 Bom 291.

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tation and did not alter his position to his prejudice by believing that representation, then there is no question of estoppel at all. In this case the mortgagee was aware for what purpose the money was borrowed. The document recites a purpose and he does not adduce evidence to show that the purpose recited in the mortgage deed is not the purpose for which the money was borrowed. But it is very strongly pressed upon my attention by Mr. Viswanatha Aiyar that the mere consent of the reversioner to a transaction is sufficient to make the transaction valid. Strong reliance is placed on *Mahadeo Prasad Singh* v. *Mata Prasad* (6). It was held in that case that, if the next presumptive reversioner at the time of a transfer made by a Hindu widow of property of her deceased husband assents to such transfer, neither he nor any of his successors-in-title can afterwards dispute its validity. With very great respect I am unable to follow the reasoning of the learned Judges in that case. The decisions of the Privy Council on which the learned Judges rely do not support such a wide proposition as that laid down in that case. At page 53 the learned Judges observe : "If it was intended to lay down the general proposition that in no case a reversioner can by his act or conduct estop himself from challenging a transfer after he has succeeded to the estate, then we would not agree with the decision." This statement of the law is correct. If a reversioner by his act which amount either to ratification or election or some other act which he has done after the reversion opened, in order to make the alienee believe that he was standing by the transaction and that he was prepared to allow it to be good, he cannot afterwards resile from that position; but by the mere consent to the transaction at the time when it takes place, it cannot be said that in all cases a reversioner is estopped from contesting the validity of the transaction after the death of the limited owner. The other cases, *Gur Narayan* v. *Sheolal Singh* (7) and *Basappa* v. *Fakirappa* (8), are also on the same lines as that in *Mahadeo Prasad Singh* v. *Mata Prasad* (6), and, as I have already observed, the broad principle which the learned Judges lay down in those cases is not in my opinion warranted by the decision of the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan* (9). Each case has to be considered in connection with the facts of that case. Unless any broad principle has been laid down

6. (1921) I L R 44 All 44. 7. (1918) I L R 46 C 566 : 36 M L J 68 (P C).
8. (1921) I L R 46 Bom 292.
9. (1918) I L R 42 Mad 523 : 36 M L J 493 (P C).

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by the Privy Council it would not be right to extract from a few cases a broad principle as that which has been laid down by the learned Judges of the Allahabad High Court in *Mahadeo Prasad Singh* v. *Mata Prasad* (6) and *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (10). From the judgment of their Lordships of the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan* (9) it is clear that, if the reversioners consent to a transaction that would be, in the absence of other evidence, presumptive evidence of the necessity for the transaction. It is for the alienee to prove necessity or to prove that he made a *bona fide* inquiry and satisfied himself that there was necessity for the alienation. But where he is unable to give evidence of circumstances which would amount to necessity in law, or where he is not able to prove that he made *bona fide* inquiries as to the circumstances which would constitute necessity, if he proves that the nearest reversioners consented to the alienation, that would be presumptive evidence of the existence of the circumstances which would amount to necessity, and, in the absence of any evidence to the contrary, that presumption could be acted upon and the onus laid upon the alienee would be shifted to the reversioner. That being the principle of the decision in *Rangaswami Goundan* v. *Nachiappa Goundan* (9), it is difficult to see now the mere consent of the reversioner estops him from disputing the validity of the transaction. If he is able to show that the transaction was for a purpose which ostensibly could not be binding on the reversioner, then the mere fact that he consents to the alienation cannot possibly estop him. Supposing a son negotiates for a loan for his father to meet a gambling debt or a debt incurred for liquor, and if the lender knowing the purpose of the loan lends money and the document by which the amount is secured recites the purpose, namely, the payment of a gaming debt or a debt incurred for supply of liquor, the mere fact that the son has negotiated the loan or was a consenting party to the transaction or even attested the document would not be sufficient to estop him from afterwards contending that the debt incurred by the father was not binding upon him. It is only in cases where the lender was misled by a representation made by a person that he can raise the plea of estoppel. Whereas in this case the purpose is mentioned in the document itself, I fail to see how any question of estoppel

6. (1921) I L R 44 A 44. 9. (1918) I L R 42 M 523: 36 M L J 493 (P C).
10. (1923) I L R 45 All 339 (F B).

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can arise. On the other hand the mortgagee with open eyes lent money for a purpose which he must have known or ought to have known and, if he took the trouble to inquire, would have known, could not be binding on the reversioner. It is not necessary to discuss this point any further and it is not necessary for me to notice all the cases quoted by Mr. Viswanatha Aiyar.

The B schedule property consists of three items. On item 3 there was a house which was said to be worth Rs. 6,000 according to the plaintiff, and the District Munsif found that the house was worth Rs. 2,000. It was demolished by the 58th defendant who is now dead and he is represented by the 59th and 60th defendants. The District Judge has not given a finding as regards the value of the house. Inasmuch as the 58th defendant has demolished the house the plaintiff would be entitled to one-fourth value of the house, his share being one-fourth and his brothers being entitled to three-fourths. I allow the Second Appeal with costs of the plaintiff and remand the appeal to the lower appellate Court for disposal after recording findings on issues 7 and 8.

A. S. V. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Kathamuthu Pillai ... *Appellant** (*1st defendant*)

*v.*

Subramaniam Chettiar ... *Respondent* (*Plaintiff's successor*).

Kathamuthu Pillai v. Subramaniam Chettiar.

*Specific Relief Act, S. 18 (c)—Contract of sale—Incumbrances disclosed to vendee—Direction by Court to redeem before receiving consideration—Validity of—Transfer of Property Act, S. 55—Applicability—Executory contracts.*

In decreeing a suit for specific performance of an agreement to sell immoveable property, the Court found that there were certain encumbrances which the vendor had agreed to discharge and therefore gave a direction in the decree that he should draw out of Court the sale price only after discharging the encumbrances. *Held,* the direction was quite valid. S. 18 (*c*) of the Specific Relief Act applies not only to undisclosed encumbrances, but also to cases were the vendor undertakes to discharge encumbrances before sale.

The covenants contained in S. 55 of the Transfer of Property Act apply to contracts of sale as well as to completed contracts. Reasoning of Sadasiva Aiyar, J. in *Adikesavalu Naidu* v. *Gurunatha Chetty,* I L R 40 M 338 dissented from.

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*S A No. 694 of 1923. 2nd November, 1925.

Second Appeal against the decree of the Court of the Subordinate Judge of Madura in A. S. No. 68 of 1919 (Appeal Suit No. 484 of 1918 on the file of the District Court of Madura) preferred against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 560 of 1912.

Kathamuthu Pillai v. Subramaniam Chettiar.

*K. Rajah Aiyar* and *V. Ramaswami Aiyar* for appellant.

*K. Bhashyam Aiyangar* for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff's suit is for specific performance of a contract of sale entered into with him by the 1st defendant. The District Munsif gave a decree for specific performance and the Subordinate Judge dismissed the appeal of the 1st defendant. He has preferred this second appeal.

The contention of the appellant is that the direction in the decree "that 1st defendant do draw the above amount on discharging the decree in O. S. No. 185 of 1910 of the Principal District Munsif's Court of Madura and filing a copy of the record of satisfaction" is bad in law. The argument of Mr. Rajah Aiyar is that when a decree for specific performance is given against the vendor he should not be directed to redeem any encumbrance on the property which was not disclosed to the vendee. The agreement, dated the 18th day of October, 1909, does not mention the existence of any encumbrance on the property contracted to be sold, nor is there any recital in it that there are no encumbrances on the property. The finding of the learned Subordinate Judge is that the 1st defendant did undertake to free the property from two encumbrances which were mentioned in the certificate of sale, Ex. C. The 1st defendant purchased the property in Court auction in execution of his decree in O. S. No. 141 of 1902. In the sale proclamation he stated that the encumbrances had been discharged. In Ex. C, which was drawn up by the Court, there is a recital that the encumbrances have been discharged. The finding is that the 1st defendant knew that these encumbrances had not been discharged and that he undertook to discharge them when the agreement, Ex. A, was entered into. The question is, when a vendor undertakes to discharge the encumbrances on the property, whether the Court decreeing specific performance can direct him to discharge the encumbrances before he is paid the consideration for the sale? The contention of Mr. Rajah Aiyar is that the Court should decree specific performance and if the vendee finds that there are encumbrances on the property, he should bring a suit for

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damages against the seller. Under S. 55, cls. (*i*) & (*g*) of the Transfer of Property Act, a seller is bound to discharge all the encumbrances on the property then existing. If the vendee is not aware of the existence of any encumbrance on the property when the contract of sale is entered into, and he comes to know of the existence of any encumbrances he can ask the seller to discharge those encumbrances before a sale is effected, and when he sues for specific performance of the contract of sale could it be said that he is not entitled to have a direction in the decree that the seller should discharge the encumbrances on the property before he is paid the consideration for the sale ? The provisions contained in S. 18 (*c*) of the Specific Relief Act apply to this case : where the vendor professes to sell unincumbered property and if it is afterwards found that the property is mortgaged for an amount not exceeding the purchase money, the purchaser may then compel the seller to obtain a conveyance from the mortgagee, or himself pay off the encumbrances out of the unpaid purchase money. Here, on the finding of fact that the vendor undertook to discharge the encumbrances, the purchaser was entitled to insist upon his discharging them before a conveyance is effected through Court. He is entitled to ask the Court to give a direction in the decree that the encumbrances should be discharged before the consideration for the sale is paid to him.

Considerable argument was advanced by Mr. Rajah Aiyar that the provisions of S. 55 do not apply to executory contracts; in other words, the covenants contained in S. 55 of the Transfer of Property Act apply only to completed sales and not to agreements of sales. Under S. 55 the seller is bound to do certain things. One of them is to answer to the best of his information all relevant questions which may be put to him by the buyer in respect of the property and the title thereto, and the other is to produce before the buyer on his request for examination all documents of title relating to the property which are in the seller's possession. It cannot be said that these two things should be done after the sale is effected. The covenants contained in S. 55 apply to contracts of sale as well as to completed contracts. In this connection, with great respect, I am unable to agree with the reasoning of Sadasiva Aiyar, J. in *Adikesavalu Naidu* v. *Gurunatha Chetty* (1). Abdur Rahim, J. was of opinion, that the

1. (1916) I L R 40 Mad 338 : 32 M L J 180 (F B).

covenants contained in S. 55 apply to contracts of sale as well.

It is argued for the appellant that it was open to the plaintiff to repudiate the contract and to claim damages as the vendor was not able to give him a clean title. No doubt the vendee can repudiate the contract of sale if he finds that the vendor has no title to convey or that the property is encumbered. Vide *Reeve* v. *Berridge* (2). The case in *Eastern Mortgage and Agency Company, Ltd.* v. *Fazlul Karim* (3) does not apply to the facts of this case. There it was held that it was open to a vendee to resist a suit for specific performance on the ground that the defects in the property were not disclosed by the vendor. But here the 1st defendant did undertake to discharge the encumbrances on the property and the plaintiff is entitled to enforce the terms of that agreement. The argument that S. 18 (*c*) applies only to undisclosed encumbrances and does not apply to cases where the vendor undertakes to discharge the encumbrances on the property before the sale cannot be accepted. When the vendor undertakes to discharge the encumbrances on the property, he contracts to sell the property unencumbered and therefore cl. (*c*) applies to a case like this. The Court granting specific relief is entitled to direct the vendor to discharge the encumbrances which he undertook to do before he is paid the consideration for the sale. The clause in the decree objected to is perfectly legal. In this connection I may refer to a recent decision of Spencer and Viswanatha Sastri, JJ. in *Venkataranga Aiyar* v. *C. S. Ramaswami Aiyar* (4) in which a similar direction was given by them.

It is stated that the amount secured by the two mortgages on the property which the vendor undertook to discharge is about Rs. 300 or Rs. 400. As the consideration for the sale is Rs. 1,950, the direction in the decree may be varied by directing that the amount which would be necessary to discharge the encumbrances be kept in deposit and the balance be drawn by the 1st defendant. This would be an equitable arrangement as the plaintiff cannot be damnified to a larger extent than the amount of the two mortgages. If the mortgagees try to enforce their mortgages the amount in Court would be sufficient to meet their demands and the 1st defendant need not be kept out of a large sum of money by reason

2. (1888) 20 Q B D 523. 3. (1925) 41 C L J 571.
4. Appeal No. 252 of 1922.

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of a portion thereof being necessary to meet the demands of the mortgagees.

With this modification I dismiss the second appeal with costs.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Arunachalam Chetty ... *Petitioner* (Respdt. and Plff.)*

*v.*

Abdul Subhan Sahib ... *Respondent (Petitioner and 2nd defendant).*

Arunachalam Chetty v. Abdul Subhan Sahib.

*Civil Procedure Code, S. 47—Decree passed against minor—No guardian appointed to represent—Decree void—Objection if can be raised in execution.*

A decree passed against a minor, who was not represented in the suit by a guardian is void and incapable of execution, and hence in execution proceedings objections can be raised regarding the legality of the decree. *Jungi Lall* v. *Laddu Ram Marwari,* 4 Pat L J 240; *Subramania Aiyar* v. *Vaithianatha Aiyar,* I L R 38 Mad 682 followed; *Kalipada Sarkar* v. *Hari Mohan Dalal,* I L R 44 Cal 627 distinguished.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of Small Causes, Trichinopoly, in E. A. No. 1262 of 1923 in Suit No. 3863 of 1919.

*K. Rajah Aiyar* for petitioner.

*T. V. Muthukrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The decree-holder in S. C. S. No. 3863 of 1919 on the file of the Court of Small Causes, Trichinopoly, is the petitioner. He obtained a decree against the respondent. The respondent was a minor and was not represented in the suit in which the decree was passed against him. In execution of the decree, the petitioner arrested the respondent and then the amount mentioned in the warrant was deposited by his surety in the Court and he was set free. An application was filed by the minor respondent asking the Court not to allow the petitioner to take the money on the ground that, at the time when the decree was passed, he was a minor and as such the decree was a nullity and not binding on him. The Lower Court, accepting this contention, allowed his prayer and the present Civil Revision Petition is filed against that order.

On behalf of the petitioner, it has been contended before me that the Court below as an executing Court was bound to execute the decree as it stood and was not entitled to go behind

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*C R P No. 971 of 1923. 25th September, 1925.

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the decree questioning its validity. In support of this contention reliance has been placed by the learned vakil for the petitioner on the decision in *Kalipada Sarkar* v. *Hari Mohan Dalal* (1). In that case the plaintiff was a lunatic and was represented by his wife. The suit was dismissed and costs were allowed to the defendant. Execution was sought against the plaintiff's son, the plaintiff having died in the interval. In the execution proceedings the lunatic's widow was appointed guardian *ad litem* and she objected that when she was appointed guardian for the lunatic in the suit, she was a minor. The executing Court overruled this objection. On appeal, the High Court affirmed this decision. In the course of the judgment in that case, the learned Judges made the following general observations which have been strongly relied upon before me:—

"It is indisputable that the Court executing a decree must take the decree as it stands and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree."

This case has been referred to and distinguished by the Patna High Court in *Jungli Lal* v. *Laddu Ram Marwari* (2). In that case it was held that when at the time of passing a final decree in a mortgage suit one of the judgment-debtors was dead and his representatives had not been brought on record, it was open to such representatives to object to the execution of the decree on the ground that the decree was a nullity. The learned Judges base their decision on the ground that there is a well-known distinction between voidable decrees and decrees which are absolutely void and since the decree passed against a dead person is a void decree, it was their opinion that the question of validity of the decree might be relied in execution proceedings. The correct significance of the decision in *Kalipada Sarkar* v. *Hari Mohan Dalal* (1) is pointed out by the learned Judges by drawing attention to the concluding sentence of the judgment in that case, which runs as follows:—

"This, no doubt, assumes that there is a valid decree in existence, that is, an adjudication by a Court of Justice, a decree or order, which has not ceased to be operative and is capable of execution."

The question therefore to be considered is, whether in the case before us, it can be said that there is an operative decree or a decree which is capable of execution. It has been held in *Subramania Aiyar* v. *Vaithianatha Aiyar* (3) that in a case

1. (1916) I L R 44 C 627. 2. (1919) 4 Pat L J 240 (F B).
3. (1913) I L R 38 M 682.

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where a decree was passed after the death of the defendant and before the legal representatives were brought on record, that the objection raised really related to the jurisdiction of the Court that passed the decree and it might well be considered under S. 47, Civil Procedure Code. As the decree is a void decree, it might be disregarded altogether without taking any proceeding to set it aside.

On the authorities, therefore, it seems to me that the Lower Court was right in allowing the respondent to raise the question under S. 47 of the Civil Procedure Code. Arguments based upon the policy of S. 47 might be put forward in support of the arguments advanced on either side. In my opinion the Lower Court's decision is right and I dismiss this petition with costs.

T. S. V. *Petition dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

P. Kuthalinga Mudaliar ... *Appellant** (*1st defendant*)

*v.*

M. N. Shanmuga Mudaliar and others ... *Respondents* (*Plaintiffs and 2nd deft.*)

Kuthalinga Mudaliar v. Shanmuga Mudaliar.

*Hindu Law—Widow—Alienation—Future maintenance—If can be anticipated—Validity of alienation.*

A Hindu widow, unable to maintain herself out of the income of her husband's property which consisted only of a small house, sold it for Rs. 600, out of which Rs. 300 went towards discharging debts binding on the reversioners and the other Rs. 300 she retained for her future maintenance. The Courts below found that the sale was *bona fide* and the consideration proper. *Held,* the sale was valid and binding on the reversioners.

There is no hard and fast rule that a Hindu widow cannot alienate property for future maintenance or anticipate personal necessity. Each case would depend upon its circumstances. Where there is no other property and the only property is not capable of yielding any appreciable income, she can sell it for meeting her maintenance expenses.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in A. S. No. 53 of 1922 (A. S. No. 691 of 1922, District Court) preferred against the decree of the Court of the District Munsif of Tenkasi in O. S. No. 104 of 1920 (O. S. No. 402 of 1919, District Munsif's Court, Ambasamudram).

*S. Ramaswami Aiyar* for appellant.

*K. Venkateswaran* for respondents.

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*S A No. 578 of 1923. 23rd October, 1925.

Kuthalinga Mudaliar *v.* Shanmuga Mudaliar.

The Court delivered the following

JUDGMENT :—The only point in this appeal is whether the sale should be upheld in view of the findings of fact of the learned Subordinate Judge. He has found that out of the consideration of Rs. 600, Rs. 300 went towards discharging the debts binding on the reversioner and the other Rs. 300 was for the maintenance of the 2nd defendant. The 2nd defendant, who is a widow, was unable to maintain herself out of the income of her husband's property, which consisted only of the plaint house, and was obliged to borrow. It has been proved satisfactorily and has been found by the Judge that she did incur a debt of Rs. 300 in order to maintain herself. The property left by the husband was only a house which produced no income. She had to sell the house for the purpose of paying off the debt already incurred and for maintaining herself. It is not suggested that the house was worth more than Rs. 600 paid by the plaintiff for the sale. The Subordinate Judge has set aside the sale of the property with regard to a half and has upheld the sale as regards the other half. It is difficult to see how a house like this could be divided into two halves. No doubt if the house can be divided into two halves it might be said that his order is sustainable. But this being a small house in a town and in the absence of any evidence that the house could be divided into two equal moieties and that the two moieties could be conveniently enjoyed, such a decree cannot be said to be correct.

The question is whether the sale of the property should be upheld or not. The Subordinate Judge seems to think that a widow cannot alienate property for future maintenance. It is well settled that a widow can alienate her husband's property for paying off the debts incurred for her own maintenance. The question is whether she can do so for future maintenance? There is no hard and fast rule that a widow cannot alienate property for future maintenance. Each case would depend upon its circumstances. In this case there is no other property and the only property is not capable of yielding any appreciable income. I do not see why the widow should starve herself in order to benefit the reversioners. It is admitted by the plaintiff that the widow (2nd defendant) is living by begging. If that is so, there is every reason why she should find means to support herself by selling the only property that descended to her from her husband. No doubt if there are other properties from which she could get some

Kuthalinga Mudaliar v. Shanmuga Mudaliar.

income it may be said that she is not justified in selling the house. Where land of considerable extent is sold and only a part of the consideration is found to be binding on the reversioner, it may be a question for the Court whether a portion of the land should be taken by the alienee and the rest should be released from the sale. But in a case like this I see no reason why in order to benefit the reversioner the widow should be prevented from selling the property and maintaining herself from the proceeds of the sale. As I have already observed, it is not suggested that the sale is not a *bona fide* one. On the other hand it is clear that Rs. 600 was paid in cash before the Sub-Registrar, half of which went towards liquidating the debt incurred for maintenance and the other half was kept for maintaining herself with. It is unnecessary to discuss this point at any length as I am quite satisfied that in this case the widow had no other means of maintaining herself than by selling the only property that descended to her.

Mr. Ramaswami Aiyar referred to *Naman Mal* v *Har Bhagwan* (1) in support of his contention that the sale should be upheld. In that case the learned Judges held that the proposition that a widow cannot anticipate personal necessity is not an inflexible rule. In *Kulak Chandra Das* v. *Kula Chandra Das* (2) a Bench of the Calcutta High Court held that a widow need not borrow at an usurious rate of interest for maintaining herself and then allow the property to be sold by the creditor by bringing a suit against her. I think that a widow borrowing in order to maintain herself and then allowing the property of her husband to be sold for the debt incurred by her for maintenance would not be in the interests of the reversioners, for the interest and the costs would amount to a large amount and a prudent person would rather sell the property and get ready cash than borrow at an usurious rate of interest and then allow the creditor to file a suit and bring the property to sale and thereby cause loss to the reversioners. The same principle has been laid down in *Kannan Chetty* v. *Amirthammal* (3) and *Bal Krishna Das* v. *Hira Lal* (4). On the other side I am referred to the decision in *Appajee Panthulu* v. *Ramacharlu* (5) as supporting the contention of the respondent that the sale should be set aside inasmuch as a portion of the consideration was for main-

1. (1921) I L R 2 Lah 357. 2. (1918) 46 I C 269.
3. (1914) 1 L W 877. 4. (1918) I L R 41 All 338.
5. (1910) 9 M L T 307.

tenance. On a perusal of the case I am unable to find that any principle was laid down in that case. The learned Judges found that considerable suspicion attached to the transaction and in the circumstances they set aside the alienation by the widow. There was no question of the maintenance of the widow in that case. A widow is entitled to live by selling the property of the husband if there is no other means available for her maintenance. As I have already observed no widow is bound to starve herself or die in order to benefit the reversioners. Such a proposition would be monstrous and opposed to all principles of Hindu Law. *Dhondhia* v. *Hekayet Pandey* (6) and *Paparayadu* v. *Rattamma* (7) do not apply to the facts of the present case. No doubt, if the sale is not found to be a *bona fide* sale, the plaintiff would be entitled to have it set aside. But in this case I am quite satisfied that the proper decree would be to allow the sale to stand inasmuch as the transaction was a *bona fide* one and the consideration was for the purposes which could bind the reversioners.

I allow the appeal and dismiss the plaintiff's suit with costs throughout.

The Memorandum of Objections is dismissed. No costs.

T. S. V. *Appeal allowed : Memorandum of Objections dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Solayappa Naicker ... *Appellant** (*Plaintiff*)

*v.*

Shunmugasundaram Pillai ... *Respondent* (*Defendant*).

Solayappa Naicker *v.* Shunmuga-sundaram Pillai.

*Insolvency—Order of adjudication under Provincial Insolvency Act (III of 1907)—Execution application filed after new Act V of 1920 came into force—Leave of Insolvency Court not obtained—Order of arrest—Legality of—Substantive rights not affected by change in law.*

A person who had been adjudicated insolvent while the old Provincial Insolvency Act (III of 1907) was in force was ordered to be arrested in execution after Act V of 1920 had come into force. No leave of the Insolvency Court was obtained prior to the application for arrest. *Held,* the order was without jurisdiction, as the insolvent had a substantive right under the old Act to have execution proceedings against him stayed unless the Insolvency Court gave leave to prosecute the same. *Natesa Chettiar* v. *Annamalai Chettiar,* (1922)

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*A A A O No. 90 of 1924. 20th November, 1925.

6. (1918) 49 I C 841. 7. (1912) I L R 37 M 275: 24 M L J 62.

Solayappa Naicker *v.* Shunmugasundaram Pillai.

17 L W 319; *Rangiah Chettiar* v. *Annaswami Alwar Aiyangar*, (1923) 18 L W 836 followed. Such a substantive right cannot be abrogated by the coming into force of a new Act.

Appeal against the order of the District Court of Ramnad at Madura in C. M. A. No. 71 of 1923 preferred against the order of the Court of the District Munsif of Satur in E. A. No. 692 of 1923 (E. P. No. 863 of 1923) in O. S. No. 281 of 1915 on the file of the Court of the Additional District Munsif of Srivilliputtur.

*Watrap S. Subramania Aiyar* for appellant.

*K. V. Venkatasubramayya Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—I am prepared to follow the judgments of this Court reported in *Natesa Chettiar* v. *Annamalai Chettiar* (1) and *Rangiah Chettiar* v. *Annaswami Alwar Aiyangar* (2) which imply that the right of an insolvent adjudicated as such under Act III of 1907 to have execution proceedings against him stayed, unless the Insolvency Court gives leave to prosecute them, is a substantive right. That being so, it has not been abrogated by the subsequent statute Act V of 1920. The order in E. P. No. 863 of 1923, dated 19th September, 1923, to arrest respondent was not with leave of the Insolvency Court and was therefore without jurisdiction.

It is contended that it has become final because no appeal was presented against it. But it was an order passed without notice. On 5th October, 1923, he was arrested, brought to Court and released on terms, and on 16th October, 1923, he put in his E. A. No. 692 of 1923. There was, therefore, no order for arrest in force at the time he put in his E. A. and no question of *res judicata* therefore arises. Appellant urges that the Lower Appellate Court should not have dismissed his E. P. *in toto*. I agree and direct that the E. P. be not dismissed but be returned to the appellant with directions that it cannot be entertained by the executing Court unless and until the leave of the Insolvency Court is obtained. The appeal is allowed to this extent only and is otherwise dismissed. The respondent will get his costs.

T. S. V. *Appeal allowed in part and dismissed as to the rest.*

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1. (1922) 17 L W 319. 2. (1923) 18 L W 836.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

O. S. Ramachandra Aiyar,
Official Receiver, Tanjore ... *Petitioner** (*Petitioner*)
*v.*
Sankara Aiyar and others ... *Respondents* (*Respondents Nos.* 3, 1 *and* 2).

Official Receiver Tanjore *v.* Sankara Aiyar.

*Provincial Insolvency Act, S. 20—Interim Receiver appointed under—Powers of—Sale in execution of insolvent's property prior to appointment—Right to apply under O. 21, R. 89, Civil Procedure Code, to set aside—Sanction of Insolvency Court—Necessity.*

After the sale in execution of the property of one *M*, the Official Receiver was, on an application presented before the sale by another creditor of *M* to have him adjudicated as an insolvent, appointed interim Receiver under S. 20 of the Provincial Insolvency Act. The Official Receiver was appointed Receiver of the properties with no other provision except that he should take steps to see that the properties were not sold for Government kist. He deposited moneys under O. 21, R. 89, Civil Procedure Code, to have the execution sale set aside. The question for decision was, whether the interim Receiver, by virtue of his appointment under S. 20 of the Provincial Insolvency Act, had power to act under O. 21, R. 89; in other words, whether, by virtue of his appointment under that section, he stood in the place of the owner. The Official Receiver did apply to the Insolvency Court for sanction to apply to set aside the execution sale, but no sanction, antecedent or *ex post facto*, was ever accorded to him.

*Held*, that the interim Receiver had no power to apply under O. 21, R. 89.

*Quaere*:—Whether in India a Receiver put into mere possession under O. 40, R. 1 (*c*), Civil Procedure Code, can arrogate to himself powers to be conferred under O. 40, R. 1 (*d*)?

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of West Tanjore, dated 23rd October, 1924, in C. M. A. No. 29 of 1924 preferred against the order of the Court of the District Munsif of Mannargudi in E. A. No. 312 of 1924 in E. P. No. 2 and E. P. R. No. 893 of 1923 in O. S. No. 407 of 1923.

*C. V. Anantakrishna Aiyar* for petitioner.

*S. Varadachariar, K. Balasubramania Aiyar* and *A. V. Viswanatha Sastri* for respondents.

The Court delivered the following

JUDGMENT:—The petition is to revise the order of the District Judge, West Tanjore, in C. M. A. No. 29 of 1924.

One V. Mahadeva Aiyar was judgment-debtor in O. S. No. 407 of 1923 on the file of the Court of the District Mun-

*C R P No. 7 of 1925. 2nd October, 1925.

Official Receiver Tanjore *v.* Sankara Aiyar.

sif of Mannargudi. On 7th April, 1924, a creditor applied to have him adjudicated insolvent. On 8th and 9th April property of his was sold in execution of the decree. On 24th April the Official Receiver was appointed interim Receiver under S. 20 of the Provincial Insolvency Act. On 9th June the interim Receiver deposited moneys under O. 21, R. 89, Civil Procedure Code, to have the sale set aside and the District Munsif of Mannargudi set it aside. The District Judge reversed the order of the District Munsif. Hence the petition.

The point for determination as correctly stated by the learned Judge in his second paragraph is whether the interim Receiver by virtue of his appointment under S. 20 of the Provincial Insolvency Act had power to act under O. 21, R. 89, Civil Procedure Code. He was appointed after the sale and therefore cannot be said by his appointment to have been vested in an interest by virtue of a title acquired before such sale. He can only come in under O. 21, R. 89, Civil Procedure Code, if he is held to be " owning such property, " if, that is to say, by virtue of his appointment under S. 20 of the Provincial Insolvency Act, he stands in the place of the owner.

S. 20 of the Provincial Insolvency Act attracts the provisions of O. 40 of the Code of Civil Procedure. R. 1 of which provides (*a*) that the Court may appoint a Receiver; (*c*) commit the possession, custody or management of such property to the Receiver ; (*d*) confer upon the Receiver certain powers including the protection of the property.

In the present case the Court appointed the Official Receiver, Receiver of the properties with no other provision except that he should take steps to see that the properties were not sold for Government *kist*. It is difficult to see how this order could possibly make the Receiver a *quasi*-owner of the property. It is argued that some one had to protect the property and since it had been taken out of the owner's hands, the Receiver must be presumed to have been the proper person to act. Even assuming that the owner had been removed from the possession and had no right to protect the property and the Receiver considered it his duty to act, his proper ordinary course would be to apply to the Court for power to act, and, as a matter of fact, this is exactly what he did. He wrote on 28th May, 1924, requesting sanction to move the Munsif to set aside the sale. This letter was mislaid by the Judge till 26th June. Meanwhile the Receiver had informed

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the Judge on 9th June that he was about to file his application under O. 21, R. 89, Civil Procedure Code, in anticipation of sanction and on 10th June he filed such application with an affidavit asserting that he was entitled to present it as the interest of the judgment-debtor had vested in him. It does not appear from the record that any *ex post facto* sanction was ever accorded by the Judge. In these circumstances, it is impossible to hold that the Receiver's action was authorised. The statute entirely provides for the contingency and he attempted to obtain sanction as contemplated by the statute; and there is no room for assuming that inherent power vested in the Receiver from the mere fact that he had been appointed as such.

Where the Indian statute is clear and sufficient nothing is to be gained by a reference to English case-law. *Official Receiver of Coimbatore* v. *Kanga* (1) is not directly in point, for there the Receiver whose powers are discussed is one appointed after adjudication under Act III of 1907. Petitioner relies upon the phrase "the obtaining of leave is a matter between the Receiver and the Court." The Receiver had the power vested in him under S. 18 of that Act, and he was in the position of a Receiver under S. 28 of the present Act; he had in himself the power to sue, and whether he obtained permission of the Court was a matter between him and the Court.

In the present case without the order of the Court he has not the power.

In *Akula Paradesi* v. *Dhelli Jagannadha Rao* (2) it is held " apart from any express power to sue conferred by the Court, Receivers would have a right of action by virtue of mere possession." This is an *obiter dictum* following upon a consideration of English authorities with little bearing upon the point actually in question in that case.

The word "confer" in sub-clause (*d*) of O. 40, R. 1 would seem to suggest that until the Court made specific provision the Receiver is not inherently endowed with a right to sue. But even if it is held that "mere possession" gives such a right, it is doubtful if it would extend to making an application under O. 21, R. 89, Civil Procedure Code. At any rate in this case the Receiver can only sue *qua*-owner and mere possession cannot be said to put the

1. (1921) I L R 45 M 167: 42 M L J 53.
2. (1904) I L R 28 M 157 at 160.

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Receiver in the position of the owner. If he were claiming an interest by virtue of title acquired before the sale his mere possession would more easily support such a claim but I confess to considerable doubt whether in India a Receiver put into mere possession under O. 40, R. 1 (*c*), can arrogate to himself powers to be conferred under O. 40, R. 1 (*d*).

Nor do I think that he can be vested with such powers by operation of S. 56 of the Provincial Insolvency Act. This section provides for the appointment of a Receiver for the property of the insolvent at the time of adjudication or afterwards. Such property shall thereupon vest in the Receiver and the section allows the Court to demand security from such Receiver and to provide for his remuneration, it also allows the Court to eject a trespasser, and also to mulct a Receiver for malfeasance. There comes the fifth sub-clause on which the petitioner relies "the provisions of this section shall apply, so far as may be, to interim Receivers appointed under S. 20." It can hardly be argued from this that under S. 56 the property vests in the interim Receiver with all the incidents of S. 28. S. 20 is still the section governing the interim Receiver's powers and he shall only have such of the powers conferrable on a Receiver appointed under the Code of Civil Procedure as the Court may direct.

Accordingly there is no ground for revision. The petition is dismissed with costs of the 1st respondent.

A. S. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE RAMESAM.

M. C. Chegganmull Sowcar ... *Appellant** (*Plaintiff*)

*v.*

Desur Manicka Mudaliar ... *Respondent* (*Defendant*)

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*Contract Act, S. 59—Several debts due—Payment of money by debtor—Appropriation—Right to—Intimation by debtor—If to accompany payment—True rule as to—Concealed appropriation by creditor ineffective—Negotiable Instruments Act, Ss. 68, 69—Presentment—Absence of—Effect—Jurisdiction to sue—If determined by place for presentment.*

Where a debtor who owes a number of distinct debts to the same creditor makes a payment, he need not make an intimation of the appropriation which he desires along with the payment or so immediately after it is to form part of the same transaction. The words "with an intimation" in S. 59 of the Contract Act are not inconsistent with an intimation after a reasonable interval. If the creditor has not made an effective appropriation, there is no reason why the debtor should not intimate the appropriation he

*O S Appeal No. 9 of 1924. 15th October, 1925.

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wishes later on. The essence of an appropriation is that it should be known to both parties and hence an uncommunicated appropriation is not complete as between them. Where the first communication of appropriation was by the debtor, though three or four months after the payment, and the creditor did not state his own appropriation till more than a year after, when his suit for money was being tried, his concealed appropriation is ineffective as against the intimation by the debtor. Case-law on the subject discussed.

A promissory note mentioned "Madras or any other place where you (the creditor) have your shop as the place of payment." No presentment for payment was made either at Madras or any other place. *Held*, the creditor had no right to sue without presentment being first made. The word "place" in Ss. 68 and 69 of the Negotiable Instruments Act must be construed as including "places," as it would be anomalous to require presentment if one place is mentioned, but none if two places are mentioned. If more than one place is mentioned, there must be presentment at one or other of those places.

*Per Ramesam, J.* (Phillips, J. *dubitante*) :—The Negotiable Instruments Act dees not provide that after presentation at one of several places, that one place to the exclusion of others is the place which determines jurisdiction for a suit. The question of *forum* for the purposes of a suit is unaffected by Ss. 68 and 69 of the Negotiable Instruments Act, an Act which has nothing to do with the qu:stion of jurisdiction.

Appeal against the judgment and decree of the Hon'ble Mr. Justice Coutts Trotter (as he then was) passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 56 of 1923.

*M. A. Tirunarayanachari* and *K. B. Ranganatha Aiyar* for appellant.

*V. S. Govindachari* and *R. Rangaswami Aiyangar* for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS:—*Ramesam, J.*:—This appeal arises out of a suit to recover money due on two promissory notes. The plaintiff is the appellant before us, the learned trial Judge having dismissed the suit except as to Rs. 800 admitted due by the defendant and deposited by him in Court. The suit was filed on the 24th of January, 1923, under the summary procedure. The defendant applied for leave to defend in February. Leave was granted on the 5th of March and the written statement of defendant was filed on the 15th of March. The two suit promissory notes are dated 17th December, 1921 (Ex. B) and 22nd December, 1921 (Ex. A) and carry interest at the rate of Rs. 2-13-0 per cent. per mensem. The plaintiff and defendant ordinarily reside at Tindivanam in the South Arcot District. On the 22nd of April, 1922, the plaintiff through his Madras vakil Mr. Mahadeva Aiyar sent a notice demanding the balance due on Ex. B (Ex. V). Two days

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after, the same vakil issued another notice, Ex. D, in which he mentions that he was really instructed by his client to demand the amount due on both the pronotes but that one of them was omitted from the first demand by mistake and the mistake having been detected the second notice was sent. In the second notice he mentions that two amounts of Rs. 1,000 each were paid on 3rd February and 16th April. The defendant in his reply notice Ex. VI, dated 1st May, 1922, and in his written statement pleaded that besides the payments admitted by the plaintiff he made two other payments, *viz.*, a sum of Rs. 1,000 on 5th January, 1922 and another sum of Rs. 700 on 22nd April, 1924. I shall first deal with the payment of Rs. 700. The defendant examined himself (D. W. 1) and D. Ws. 2, 3 and 4 to prove this payment. D. W. 2 is Krishnaswami Aiyar, a clerk in the Firm of Srinivasa Aiyangar and Sons. He says his firm lent Rs. 1,200 to the defendant and that the defendant wanted it to give to some Marwari whose name he does not remember. D. W. 3 is Subramania Aiyar, a clerk in the Official Assignee's Office. He saw payment of some amount in hundred-rupee notes by the defendant to plaintiff at the gate of the High Court and he and D. W. 4 were present. D. W. 4 corroborates him. He does not know the number of notes, but he saw the counting by the plaintiff who said it was 7. Defendant himself swears that Rs. 700 was paid on 22nd April out of the Rs. 1,200 borrowed from Srinivasa Aiyangar and Sons. He sent word to the plaintiff who was living at St. Thomas Mount. The plaintiff has not gone into the box. His clerk produced the account books which will be referred to later on and he does not know anything personally about these transactions. The defendant's ledger (Exs. 1 and 1-A) supports him. The result is, we must believe the evidence adduced for the defendant and find that this payment of Rs. 700 has been proved. It follows that the plaintiff is not an honest man.

The other payment of Rs. 1,000 is admitted by the plaintiff before us and also in the Court below at the time of trial. But his contention with respect to it is, that it was credited by him towards a third pro-note executed by the defendant to the plaintiff on 5th November, 1921, for Rs. 1,000 carrying interest at 2 per cent. The defendant in his affidavit (dated 23rd February, 1923) which he filed for obtaining leave to defend mentioned in para. 5 : "The account-book of the plaintiff himself may, if produced, substantiate the payment of the

said sum of Rs. 1,700." In the counter-affidavit of the plaintiff, para. 2, the plaintiff said : " I deny that the defendant paid the sums of Rs. 1,000 and Rs. 700 referred to in paragraphs 4 and 5 of the affidavit and say that the said payments are absolutely false. " This statement of the plaintiff is now sought to be explained by his Advocate as meaning that the payments towards the suit pro-notes were meant to be denied and not the fact of payment itself so far as the payment of Rs. 1,000 is concerned. Even with this explanation, as far as the payment of Rs. 700 is concerned, I have already found that the statement must be false. As to the other payment, seeing that the defendant who sent the amount through his son, who signed in the plaintiff's account book and who must have informed his father of the entry, refers to the fact of entry in the account book in paragraph 5 of his affidavit and that the plaintiff himself relied on such account books at the trial to prove the credit towards another pro-note, I find it difficult to believe that the plaintiff, assuming that he is dishonest, meant to deny the payment of Rs. 1,000 on 5th March, 1923. It seems to me unlikely that he meant to deny both payments on 5th March and afterwards in August during the time of trial meant to admit one of them. It seems to me that the affidavit of the plaintiff who is a Marwari was drafted for him by a careless pleader or pleader's clerk and signed by him without realising its full import. I make these remarks not for the purpose of establishing that the plaintiff is an honest man—and with the other finding he cannot be made honest—but merely to know what the probability is. Whatever it may be, we have got the fact that he admits payment of Rs. 1,000 and the only question is, whether there is a legally binding appropriation of the payment towards another pro-note. This other pro-note was mentioned to the defendant in his cross-examination and he was asked to produce his day book of that date. But he said he has not got it. The day book produced by him begins from 21st November, but its non-production is immaterial. He admitted the pronote after he was shown the entry in the plaintiff's book signed by the defendant's son He said: " This pronote amount was not borrowed for my business. You may look into my account. The entry is signed by my son Ramalingam. I might have borrowed another amount from the plaintiff on 5th November, 1921 (By Court) : I did borrow it. I have been keeping separate ledgers. There is a ledger prior to the one I have filed in Court but it

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belongs to my own business while the one I have filed belongs to the joint business. Prior to November, 1921, I have got a day book for my own business. There is also a ledger page maintained for my dealings with the plaintiff for that period. The balance due on that ledger has been brought over to this ledger. It would have been entered in all other ledgers like that. That is paddy business, joint business, and this is ground-nut business. In regard to my own business there would have been nothing there prior to November, 1921, and so it would not have been brought forward." This deposition shows that the defendant admitted the pronote of 5th November, 1921, after some hesitation, but suggests that it is connected with some joint business which is a paddy business. He does not say who the other partner is, nor does he say that the pronote was signed by himself and the other partner. Nor does he say that the plaintiff knew it was a business joint between defendant and another. I do not suggest by referring to his hesitation that the defendant is dishonest. I am satisfied that he has been honest throughout this case. But he hesitated at first probably because he was afraid that the entry signed by his son may bind him as an appropriation towards the other note. The defendant's son was examined as D. W. 5. He was in school in the year 1921. He says his father gave him Rs. 1,000 and he paid it to the plaintiff but did not get any document or pronote. In cross-examination he admits his signature under the entry in plaintiff's day book, Ex. C, which shows that the amount of Rs. 1,000 was credited towards the pronote of 5th November, 1921. He was then asked: "Q. You told your father what you wrote here? A. No." This question suggests that he wrote the whole entry. It is true that the question is a double question and that double questions are not generally fair to witnesses. But seeing that the question was not objected to either by the witness or by his vakil Mr. Govindachari and seeing it is a very simple question which is not apt to confuse a witness, I think it is clear to me that neither the witness nor the defendant's vakil meant to suggest that the entry was not written by the witness. The only other alternatives are that the entry was written by some other person but signed by the defendant's son or there was no entry then but the bare signature of the witness taken then and there was an interpolation afterwards. There is no re-examination of the witness suggesting such interpolation. Nor did Mr. Govindachari seriously suggest before us, though

I put the suggestion to him, that the entry was interpolated afterwards. I cannot imagine that the Judge and the practitioners on either side were thinking that they were exhibiting the signature of the witness only as an exhibit, for, such exhibit is of no use in the case. I think all understood in the Court below that the whole entry with the signature was meant to be exhibited and that effect of the entry made by the plaintiff but not communicated to the defendant. Mr. Tirunarayanachari, the learned Advocate for the plaintiff, contended that the notice, Ex. D, may be taken to be a notice of appropriation towards the note of 5th November. But this contention cannot be accepted. Ex. D makes no reference to the pro-note of 5th November. It is true that, in that notice, the payment of Rs. 1,000 on 5th January was not mentioned as a payment towards the suit notes. But it cannot be necessarily inferred from this that the amount must have been credited towards the third note. There are other alternatives. The amount might have been kept in suspense or one might imagine that it was a mere piece of omission as Ex. D already shows that the vakil committed other mistakes. In Ex. VI the defendant mentions to plaintiff that that amount was sent towards the suit pronotes. This is the first occasion on which an appropriation known to both parties is stated. Mr. Tirunarayanachari contends that a debtor can intimate the appropriation he desires only along with the payment or so immediately after it as to form part of the same transaction and cannot make his appropriation long after the payment. It is true that if the defendant does not intimate his wishes along with the payment there is a chance of the creditor making an appropriation and intimating to the debtor and thus shutting the mouth of the debtor for ever. But supposing the creditor has not made any appropriation, can it be said that the debtor cannot make the appropriation which he wishes, some reasonable time after, say, a week or a month or three months. It may be said that whenever he intimates such a wish after a reasonable interval it formed part of the same transaction as the payment. But should it be immediately after the payment? I do not see why it should be immediately after a payment. The words " with an intimation " in S. 59, Indian Contract Act, are not inconsistent with an intimation after a reasonable interval. So long as both have not made an appropriation, I do not see why the debtor cannot intimate the appropriation he wishes to the creditor later on. Mr. Tiru-

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narayanachari, though he had first denied that a debtor cannot do this, practically conceded this in his argument. In such a case, he said, the creditor leaves it open. If once so much is conceded it follows that the essence of an appropriation is that it should be known to both parties and if not communicated by the creditor that it is left open, for, if we hold an uncommunicated entry in an account-book effective, an entry in an informal note-book or a loose piece of paper or even a piece of paper put in an envelope and secreted or even a bare mental resolution to appropriate in a particular way (sworn to by the creditor) would bind the debtor. In the case of regular account-books generally an extract of the account-book is sent to the opposite party according to the custom in commercial circles. In *The Mecca* (1) cited by the appellant Lord Herschell said at page 292 :—

> "It is clear that if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise. What, then, was the effect of bringing the items of debt into a single account, and *transmitting it to their debtors* in the manner they did?"

This quotation shows that so long as the appropriation was not communicated to the debtor, the creditor can alter it afterwards, thereby showing that an uncommunicated appropriation is not complete as between both parties. If it is so complete, one cannot alter it. There seems to be an analogy between this, and the communication of an acceptance of an offer of a contract or a revocation. The principle seems to be that unless both parties have known the entry it is not complete as between both the parties. It is difficult to see why an uncommunicated appropriation in an account-book should be binding on the debtor but the creditor may be at liberty to alter it. At page 294 Lord Macnaghten says :—

> "But it has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from *a statement of account*, or anything else which *indicates an intention* one way or the other and is *communicated to* the debtor, provided there are no circumstances pointing in an opposite direction."

1. (1897) A C 286.

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The use of the words " express, implied or presumed, " " communicated, " " indicates an intention " show that a concealed or secreted entry cannot satisfy the requirements laid down by Lord Macnaghten. In *Simson* v. *Ingham* (2) Bayley, J. observed :

> "If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account."

*See* also *Friend* v. *Young* (3) and *Smith* v. *Betty* (4) and Chitty on Contracts, pp. 851 and 852. In the present case, up to 1st May, 1922, neither party communicated his intention to the other. For the first time in Ex. VI the defendant mentioned that he paid the amount towards the suit notes. Within four months after the payment he repeated this in his affidavit of February, 1923. The plaintiff does not contradict it up to the trial. I do not see that we must infer that he accepted the defendant's wishes, for he was pressing his suit, but it seems to be a piece of foolish and meaningless cleverness in not stating his own appropriation up to the trial. Though I am not able to infer that the payment must be taken to be appropriated by the creditor towards the suit notes under the circumstances existing on 5th January, 1922, within the meaning of S. 59 of the Contract Act [see *Rameswar Koer* v. *Mahomed Mehdi Hossein* (5)] all the later circumstances up to the trial, I think, justify me in rejecting the plaintiff's earlier concealed appropriation as ineffective and in holding that the defendant's intimation in Ex. VI was reasonable in the circumstances and binds both the parties. This conclusion is not inconsistent with the expressions of Lord Macnaghten in *The Mecca* (1) or of Vaughan Williams, Romer and Stirling, L. JJ. in *Seymur* v. *Pickett* (6) for the question whether the debtor may intimate if the creditor has left it open, did not arise and was not considered in these cases. At first I thought this conclusion is hard on the plaintiff for the suit on the other note would now be barred. On the other hand Mr. Govindachari pointed out that a suit for contribution by him against his partner will now be barred. The result is I excluded all questions of hardship from my mind in dealing

1. (1897) A C 286.
2. 2 Barnewall and Cresswell, p. 65, 107 E R 307 at 310.
3. (1897) 2 Ch 421 at 437.
4. (1903) 2 K B 317 at 324.
5. (1898) I L R 26 Cal 39 (P C).
6. (1905) 1 K B 715.

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with the case especially as I have no sympathy with the plaintiff. But I may now point out that suit on the other note by him will not be barred as the defendant's deposition in August 23 is an acknowledgment of that note. Anyhow the plaintiff is not now entitled to recover Rs. 1,000. I have dealt with the case at great length just as the argument also took a little more than the usual time a case of this kind ought to have taken, because I was anxious to deal with the facts and the law only on the merits uninfluenced by the opinion which we have formed about plaintiff's honesty with reference to the other payment. It is admitted that the interest due to plaintiff is still due. The amount of interest was admitted also in Ex. VI in May, 1922. No arrangements were made for paying it up to the date of suit and even after the suit defendant deposited only the principal amount of Rs. 800 and not the interest, thus necessitating the appeal. But Mr. Govindachari contends for the defendant that the suit does not lie in Madras. He refers to Ss. 68 and 69 of the Negotiable-Instruments Act, and the suit notes mentioned "in Madras or any place where you have your shop as the place of payment". The only specified place is Madras. But the other clause might cover a number of other places. Mr. Tirunarayanachari argued that Ss. 68 and 69 do not apply as more than one place is mentioned. But the word "place" must be construed as including "places" as it would be anomalous to require presentment if one place is mentioned but none if two places are mentioned. If more than one place is mentioned there must be presentment at one or other of those places. The demand by Ex. D does not amount to a presentment. The result is strictly the plaintiff has no right of action to sue without presentment but the defendant did not take the point in this shape, namely, that the plaintiff has no right to sue but raised only the question of jurisdiction. I do not see how these sections can help the defendant on the particular plea he has taken. The object of presentment seems to be to give the defendant an opportunity to pay, and until presentment no right to sue arises. But the Negotiable Instruments Act does not provide that after presentation at one of several places that one place to the exclusion of others is the place which determines jurisdiction for a suit. Nor do I find any such provision in the corresponding English Law, S. 87 of the Bills of Exchange Act. The section of the Civil Procedure Code which mentions the place of performance

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of the contract also as giving jurisdiction stands and is unaffected by Ss. 68 and 69 of the Negotiable Instruments Act, an Act which has nothing to do with the questions of jurisdiction. I must, therefore, disallow the plea of the defendant, a plea which is important only on the question of costs. If the defendant's plea had been upheld we would disallow all costs to plaintiff while giving a decree for interest, but as it is by the defendant's waiver of plea of right of suit that the plaintiff is able to get a decree for the balance of principal and interest I must disallow plaintiff's costs in the Court below. But the defendant's omission to admit the interest or deposit has necessitated the appeal. I therefore award plaintiff proportionate costs on the amount of interest in appeal only. The result is, the plaintiff will have a decree for the amount of interest due up to the date of deposit of Rs. 800 in Court with further interest on it from the date of the Lower Court's decree at 6 per cent. up to date of payment. Plaintiff will have proportionate costs in appeal only on such amount. He will pay defendant's costs on the rest of his claim throughout.

Phillips, J

*Phillips, J.*:—I agree. On the question of jurisdiction I entertain some doubt, but I am not prepared to differ from my learned brother's opinion. I accordingly concur in the order proposed by him.

T. S. V. *Appeal dismissed with a modification.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Kandala Thiruvenkatacharlu and others ... *Appellants** (*Plaintiffs*)

*v.*

Shaik Altoo Sahib ... *Respondent* (*Defendant*).

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*Inam—Resumption—Service tenures—Nature and incidents of—Classification—Resumability—Burden of proof—Presumptions—Finding when open to attack in second appeal—Mudam service—Incidents of.*

In a suit by the plaintiffs, *inamdars* of a village, to resume lands which were originally granted for *mudam* service, the Courts below held on the whole evidence apart from the burden of proof that the lands were not resumable and that there had been no default in the performance of the services. *Held,* the findings must be accepted in second appeal in the absence of anything to show that wrong inferences were drawn from the facts proved.

Duties of *mudam* enumerated.

A finding that land is not resumable implies that the grant was burdened with service, and the determination of the question of resumability depends on

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the nature of the tenure. For this purpose, grants are divided under two main headings, *viz.*, those burdened with service and those made in lieu of wages. Nature of the two classes of grants considered.

Where the question arises as to the class to which a specified grant belongs, there is no presumption either that it was made in lieu of wages for service, or when the grantor proves that the services were personal, that the grant was made in lieu of wages. The onus is entirely on the person claiming resumption to make out his title to resume. Case-law discussed.

Second appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 160 of 1921 (A. S. No. 5 of 1921, District Court, Chittoor) preferred against the decree of the Court of the District Munsif of Tirupati in O. S. No. 402 of 1919.

*C. S. Venkatachariar* and *N. S. Rangaswami Aiyangar* for appellants.

*B. C. Sankaranarayana* for respondent.

The Court delivered the following

JUDGMENT :—The plaintiffs, who are the inamdars of Lupuchendrapet, seek to resume the plaint land which was granted for *mudam* service and to recover possession of it with mesne profits. The defendants contend that the land has been in the possession of their family for about 150 years and that they are entitled to enjoy it so long as they are able and willing to perform the duties of *mudam*, that there has been no default and that the land cannot, therefore, be resumed.

The District Munsif has found that the land is not resumable and the Subordinate Judge has confirmed this finding.

The plaintiff has filed the present appeal. The Lower Appellate Court on a review of the whole evidence has come to the conclusion that the grant cannot be resumed.

This is what the learned Judge says :—

"I am not satisfied on the evidence that the inam is resumable."

The appellant asks me to reverse this finding.

The learned Judge has also found that there has been no default on the part of the defendants and the correctness of this part of his judgment has not been questioned.

In arriving at his conclusion that the grant is not resumable, the Subordinate Judge has relied to some extent upon the conduct of the plaintiffs as disclosed in various proceedings and upon the incongruous statements which they made from time to time. He has also relied upon the fact that

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the defendants have expended money and dug a well. Further, the defendants and their ancestors have been long in possession and the second witness for the plaintiff, who is 70 years old, has admitted that the grant was made before his time.

*Mudam's* duties are said to consist in looking after the harvest of the crops, watching the heaps of harvested produce, placing seals upon them, preventing removal of cow-dung from waste lands and general supervision of harvest operations. The first witness for the plaintiff admits that the inamdars as well as the ryots are interested in the performance of these duties. I need not go more minutely into the evidence. Although the Sub-Judge refers to certain authorities which contain observations regarding onus of proof, he has not himself decided the case with reference to any presumptions. His finding is the result of his appreciation of the evidence independent of the rule of onus of proof. It has not been shown that his finding is wrong or vitiated by any mistake and I must therefore accept it in Second Appeal.

Regarding the nature and incidents of service tenure and the presumptions that may be drawn in dealing with such tenures, there has been a fairly long argument before me. I shall therefore proceed to discuss these points. The finding that the land is not resumable implies that the grant was burdened with service.

To determine whether the grant is resumable or not, regard must be had to the nature of the tenure. Was the grant made in lieu of wages for service or was it an absolute grant subject to the condition of the performance of the service? First, dealing with grants of the former description, the relation between the grantor and the grantee is that of master and servant. Instead of remunerating the servant by wages, the master grants land to him and treating the rent payable as equivalent to wages the grantor makes a remission of the rent. The contract, however, is, in essence, one of service and as the master can, on terminating the employment, cease to pay wages, in like manner he may resume the grant on dispensing with services. The servant cannot compel his master to continue to employ him on the score that he is willing and able to serve.

Now let me turn to the second description of grants, those burdened with service. The position here is that there is an absolute grant but a condition is annexed to it. On

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the breach of the condition, the grant may be resumed. The condition being the rendering of the service, if the grantee commits default in its performance, the grantor becomes entitled to resume the grant. The mere fact that the grantor no longer requires service does not give him the right to resume the grant. Whether he requires the service or not is immaterial, the only question being whether there has been default on the part of the grantee.

It is also recognised that in the case of a grant burdened with service, it may be made a condition of the grant that it should cease when the services are no longer required. But in the absence of a provision to that effect, land held under that grant is not resumable unless the grantee commits default. This does not affect the main division of the grants under two headings, namely, those burdened with service and those made in lieu of wages. [See *Forbes* v. *Meer Mahomed Tuquee* (1), *Lakham Gavda* v. *Keshav Annaji* (2) and *Yellava Sakreppa* v. *Bhimappa Gireppa* (3)].

Where there is a grant in writing and it is produced, on a construction of it, will depend the nature of the tenure, whether the grant was made in lieu of wages or was burdened with service. But, where, as in the present case, either the original grant was not in writing or in any event is not before the Court, the nature of the tenure can be determined only on the evidence given. The Subordinate Judge agreeing with the Trial Court has found on the evidence that the grant is not resumable. Where an inference is drawn from certain facts or circumstances, it must be shown that the Lower Appellate Court has made some mistake before its finding can be set aside in second appeal. I am not satisfied that the appellant has succeeded in showing that the finding is liable to be reversed.

The appellant's learned vakil has contended that this appeal ought to be decided with reference to two presumptions: one of them broad, the other more limited. When the question arises as to the class to which a specified grant belongs, he contends that it should be presumed that the grant was one made in lieu of wages for services. Putting it in other words, the grantor has only to come to Court and show that it is a service grant. Nothing further need be done by him and the Court is bound to presume that the grant was in lieu

1. (1870) 13 M I A 438. 2. (1901) I L R 28 Bom 305.
3. (1914) I L R 39 Bom 68.

of wages. The next presumption which he asks should be drawn is, that when the grantor proves that the services are personal the Court should infer that the grant was made in lieu of wages. The range of this presumption is somewhat more limited, for, this assumes that the grantor has at least to prove one fact, do nothing more and the Court will at once presume that the grant is resumable.

For making either of these presumptions, I do not believe there is the slightest ground. Presumptions are not made at random. Some connection must be shown to exist between the fact proving and the fact to be proved, which warrants an inference from the one to the other when the two are brought into proximity. On many and varied circumstances may depend what kind of grant a man may choose to make. To presume at the very outset of a case that the grant is one in lieu of wages, does not seem to be in conformity with reason.

The second presumption referred to is, in my opinion, also opposed to reason. Having regard to the springs of human action, can it be said that a man is less likely to make an absolute grant burdened with personal service, or again, can it be said that when services are of a public nature there is any strong impelling motive for not making the grant in lieu of remuneration for those services ? There exists thus on principle no ground for making either of the two presumptions. I am also satisfied that this is the position established by authority.

Before discussing the cases on the point, I should like, in order to remove a confusion that prevails, to refer to a presumption that is permissible and has often to be drawn. When a Zemindar seeks to resume a grant, the question arises, is the land included in the zemindari ? This will depend upon whether the revenue from the land was or was not included in the assets of the zemindari at the time of the settlement. If it was included, the right of resumption would be with the Zemindar, if not, he would not have that right. If there is no direct evidence to show whether the revenue was or was not included, you may turn to the nature of the services as they may furnish a clue. If the services were personal to the Zemindar, it may reasonably be assumed that the Government would not have exempted the land from the revenue but would have treated it for the purpose of the settlement as revenue-paying land. The reason is obvious. It was the

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Zemindar that had the benefit of the services and there would be no reason why the Government should not assess the land to revenue, for, the services were after all an equivalent of the rent. A presumption is therefore made that when the services are proved to be personal, the right of resumption, if it exists, vests in the Zemindar. This is the presumption that decided cases very often refer to and this presumption and its implications are misunderstood and some loose thinking has, I am afraid, given rise to some laxity of expression.

I shall now examine the cases on the point. *Forbes* v. *Meer Mahomed Tuquee* (1) is one of the earliest and most authoritative of the decisions. The Zemindar sued for the resumption of a jaghir. Their Lordships of the Judicial Committee deal with two questions (1) regarding the nature of the tenure on which the lands were held, (2) whether the jaghir lands were made the subject of assessment at the settlement. Having held on the second point that the jaghir was included in the zemindari, their Lordships proceed to ask the question: "But is it a necessary consequence of this finding that the appellant is entitled to resume these jaghir lands?" They then observe that his right to do so must depend upon the nature of the tenure. They distinguish between the two categories of grant and conclude that the grant before them is one burdened with service. In the course of the discussion they observe that the grantees they were dealing with were not the private servants of the Zemindar. But they do not anywhere say that if the services were private or personal, there would arise a presumption that the grant was made in lieu of wages. On the contrary, in the concluding paragraphs of their judgment, they remark that it lay emphatically upon the Zemindar who is seeking to dispossess or to rackrent the grantees to make out a clear title to resumption. He, in their opinion, failed to discharge the onus and his suit was therefore dismissed. This case, therefore, far from recognising the rule of presumption contended for by the appllant, clearly lays down that the rule is the other way, namely, that the onus of proof is upon the grantor claiming resumption.

*Lakham Gavda* v. *Keshav Annaji* (2) is a suit by the inamdar to resume lands alleged to be held on service tenure.

Jenkins, C. J. and Chandavarkar, J., assume for the purpose of their judgment that the tenure was connected with

1. (1870) 13 M I A 438. 2. (1901) I L R 28 Bom 305.

services and proceed to examine if the plaintiff was entitled to resume. They refer to *Forbes* v. *Meer Mahomed Tuquee* (1) and the classification of grants adopted in that case, and in the end dismiss the plaintiff's suit observing that it lay upon him to make out that the combination of the grantee's interest and his obligation to serve was such, as to permit of resumption. This case follows the Privy Council decision and holds that the onus is upon the party claiming the right to resume.

A contention similar to the one advanced by the appellants was raised in *Yellava Sakreppa* v. *Bhimappa Gireppa* (3): The learned Judges rejected it saying that there is no presumption that where the services are personal the grantor has a right to resume the land. They say that that is the Bombay law, though they add very guardedly, that the law is possibly different in Calcutta and Madras. This does not show that the law is in fact different in these provinces but it clearly shows that in Bombay such a presumption is not drawn.

The question again arose in *Chandrappa* v. *Bhima-bin-Dasappa* (4). Beaman, J. refused to recognise any such distinction between public and private services remarking that the distinction attempted is vicious.

In *Baslingappa* v. *Chandrappa* (5) it was again held that the onus is upon the plaintiff seeking to resume.

With reference to the observation in *Yellava Sakreppa* v. *Bhimappa Gireppa* (3) that possibly the law in Madras is different, I must point out that *Lakham Gavda* v. *Keshav Annaji* (2) has been followed in this province in *Ramaswami Pattar* v. *Lakshmi Varassiar* (6), and that *Yellava Sakreppa* v. *Bhimappa Gireppa* (3) has been referred to and followed by Seshagiri Aiyar, J. in *Mrutyunjayudu* v. *Rajah of Pittapuram* (7). It cannot therefore be said that the Madras law is different from the Bombay law on this point.

*Radha Pershad Singh* v. *Budhu Dashad* (8) relied on by the appellant proceeds, with all respect, on a misconception. In it, a two-fold classification of grants is made. First, it is said there is a distinction between a grant for services of a public nature and a grant for services of a private nature.

1. (1870) 13 M I A 438.
2. (1901) I L R 28 Bom 305.
3. (1914) I L R 39 Bom 68.
4. (1918) I L R 43 Bom 37.
5. (1916) 18 Bom L R 695.
6. (1923) 17 L W 514.
7. (1915) 30 M L J 132.
8. (1895) I L R 22 Cal 938.

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In the former the Zemindar cannot resume, while in the latter, he may. Secondly, it is said, that there is distinction between grants of an estate burdened with service and grants in lieu of wages. This two-fold classification is, in my opinion, unnecessary and loses sight of the real principle involved. The main division as pointed out by Beaman, J. in *Chandrappa* v. *Bhima-bin-Dasappa* (4) is that of grants burdened with service and that of grants by way of wages for service. Each of these two main categories may again be sub-divided according to the nature of the services, personal or public. The judgment in *Radha Pershad Singh* v. *Budhu Dashad* (8) loses its value by reason of this mistake and I am not prepared to agree with the view that when services to be rendered are personal the grantor has a *prima facie* right to resume the grant. It further seems to me that *Radha Pershad Singh* v. *Budhu Dashad* (8) is opposed to the authority of the Privy Council decision in *Forbes* v. *Meer Mahomed Tuquee* (1).

If the Madras cases are examined they do not support the appellant's contention.

The sentence in *Sanniyasi* v. *Salur Zamindar* (9) that is relied on reads thus:—

> "It is ordinarily competent to a Zemindar to dispense with such services and to resume the tenure."

This may only mean that if the grant is in lieu of wages it may ordinarily be resumed. There is nothing to show that the learned Judges meant to say that if the services are personal they would presume that the grant was one made in lieu of wages. I cannot regard this as an authority for the proposition contended for.

In *Mahadevi* v. *Vikrama* (10) the following passage is relied on :

> "Now it is admitted on behalf of the appellants that if the land was held on service tenure it is resumable at the will of the Zemindar for the time being in possession."

What is the tenure that is referred to in the above passage? All lands held on service tenure are not resumable. There are two kinds of service tenures. The learned Judges were presumably referring to grants made in lieu of wages. The words literally taken mean that both kinds of grants are

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1. (1870) 13 M I A 438.
4. (1918) I L R 43 Bom 37.
8. (1895) I L R 22 C 938.
9. (1883) I L R 7 M 268.
10. (1891) I L R 14 M 365.

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resumable which, of course, is not the case. I am unable to see how this supports the appellant's contention.

In *Sri Rajah Sobanadri Appa Rao Bahadur* v. *Sri Rajah Venkatanarasimha Appa Rao Bahadur* (11) there is an observation at page 408 that it is for the grantee to make out that the land is not resumable. This case went up to the Privy Council and the decision of the Madras High Court was confirmed. But their Lordships of the Judicial Committee, while agreeing with the conclusion of the learned Judges, observe that their judgment does not imply that they adopt in entirety their reasoning. This is an important reservation and must not be lost sight of.

In *Vadisapu Appandra* v. *Vyrichendra Veerabhadraraja Bahadur* (12), there is a passage at page 408 to the effect that in this Presidency there is a series of decisions and that where a land granted on service tenure was included in the assets of zemindari at the time of the settlement there is a presumption that the Zemindar can resume. This only means that if the question is between the Zemindar and the Government as to who has the right to resume, the fact that the land is included in the zemindari. indicates that the right vests in the zemindar. This passage does not help the appellant. There is another passage at p. 409 where the learned Judges say that in the case of a grant subsequent to permanent settlement to which personal services are attached, the burden of proving that it is not resumable is on the grantee. In the first place, with all respect, I cannot accede to this proposition. Secondly what difference does it make in regard to the present question, whether the grant was prior to or subsequent to the permanent settlement?

There is one other case cited by the appellant to which I must refer. In *Gajapathi Maharaju Garu* v. *Sondi Prahalada Binoy Ratna* (13), Ayling, J., observes at page 180 that the services are of a personal character and for that reason the inams are resumable by the Zemindar. This observation, if I may say so with respect, is not quite accurate and I may point out that in a later case the same learned Judge expresses his view somewhat very differently. In *Mrutyunjayudu* v. *Rajah of Pittapuram* (7), Ayling, J., differing from Sadasiva Aiyar, J., observes:

7. (1915) 30 M L J 132.
11. (1902) I L R 26 M 403.
12. (1911) 2 M W N 406.
13. (1914) M W N 179.

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"I can find no authority for holding that the nature of the services makes any difference in the case of such a grant, though in the case of a service grant, where lands are held and enjoyed in lieu of wages, the power of arbitrary resumption would largely turn on whether the services were private or public."

By reason of the difference of opinion there was a Letters Patent Appeal and Seshagiri Aiyar and Phillips, JJ., held, Sir John Wallis, C. J., dissenting, that the grant was a grant burdened with service and was not resumable. The judgment of Ayling, J., was upheld. Seshagiri Aiyar, J., at page 144 observes:

"The next contention is that as the service was personal it was open to the Zemindar to dispense with it and to resume the land. Here again, it is not in every case of personal service that the grant can be resumed."

It is thus clear that both on principle and on authority, neither of the presumptions contended for by the appellant can be accepted. The plaintiff who seeks to resume must make out his title.

As the appeal has been argued at some length, I have reviewed the law and shown what in my opinion the right principle is. But as I have said, the Lower Appellate Court has not considered the case with reference to any rule of onus of proof, but has on the other hand arrived at a finding on a consideration of the entire evidence. Whether my view is correct or not it follows that the judgment of the Subordinate Judge must stand. The second appeal fails and is dismissed with costs.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

S. R. Muthuswami Aiyar and Sons,
Firm by one of their partners,
S. R. Muthuswami Aiyar ... *Appellants* in Appeal No.* 46 *of* 1924 (*Plaintiffs*)

*v.*

V. V. C. Ramalinga Mudaliar (*dead*)
and others ... *Respondents in Appeal No.* 46 *of* 1924 (*Respondents.*)

Muthuswami Aiyar *v.* Ramalinga Mudaliar.

*Contract—Breach by seller of—Advance paid on contract—Repayment of—Suit to enforce—Chain of buyers and sellers—Buyer a seller higher up in—*

*Appeals Nos. 46 and 99 of 1924. 21st September, 1925.

*Breach of contract by him with third party—Plea of—If open to seller in suit to recover advance received by him under contract.*

Muthuswami Aiyar *v.* Ramalinga Mudaliar.

There was a sale of a number of bales of yarn in the first instance by the Madura Mills to *V*, who sold them to the plaintiff, who sold to *H*, who sold to *M*, who sold to *A*, who again sold to the defendants, who sold in their turn to the plaintiffs. Plaintiffs did not take delivery from *V* or give delivery to *H* and all the contracts down to the goods reaching the defendants were settled in one way or another, the ultimate result being that the bales were never delivered to anybody because the ultimate buyer, *V*; obtained a cancellation of his contract with the Madura Mills and the defendants themselves settled with *A* who got some money out of them.

In a suit brought by the plaintiffs, treating the contract as a nullity, for the recovery of the sum paid by him as advance on the contract, the defendants contended that the plaintiffs could not sue them because they themselves were in default higher up in the chain of buyers and sellers.

*Held*, that the defendants having contracted to deliver the bales to the plaintiffs, they could not be heard to say that the plaintiffs were out of Court because they had been in default at an earlier stage of the series and broken a contract not with the defendants but with somebody else.

For the purpose of adjusting the rights of parties each contract must be considered solely by itself.

Appeals against the decrees of the Court of the Second Additional Subordinate Judge of Madura in Original Suit No. 21 of 1922 (O. S. No. 10 of 1922 on the file of Subordinate Court, Madura).

*A. Krishnaswami Aiyar* and *K. V. Sesha Aiyangar* for appellants.

*S. Varadachariar* and *N. Chandrasekara Aiyar* for respondents.

The Court delivered the following

JUDGMENTS:—*The Chief Justice*:—This appeal has given rise to a very interesting argument none the less so that both Mr. Alladi Krishnaswami Aiyar and Mr. S Varadachari who argued the appeal with great ability agreed in saying that whatever the result of the case was to be, the judgment of the learned Judge, which was a sort of compromise between the case of the plaintiffs and the defendants could not possibly stand.

Coutts Trotter, C. J.

The facts are very short. The contract relates to a batch of bales of yarn and the contract in question in this suit is one of 28th August, 1918 for the sale of 86 bales by the defendants as sellers and the plaintiffs as buyers. The plaintiffs paid on the contract an advance of Rs. 6,966 and their claim is for that money with interest.

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The point that arises in the appeal is best shown by an account of the history of these bales. There was a sale in the first instance by the Madura Mills to Venkatachalapathy Aiyar and Sons who sold them to the plaintiffs, who sold to Hanumantha Aiyar, who sold to P. S. N. Muruganathan Chettiar and Sons, who sold to Arumuga Mudaliar and Sons, who again sold to the defendants, who sold in their turn to the plaintiffs so that the plaintiffs occur twice in the chain. What happened, of course, was that the market was in a highly speculative state and that each one of these sales was made at a profit. But at the end the market price had fallen and the goods were not worth what the various buyers had paid for them. In these circumstances the plaintiffs brought the action in which they did not claim damages based on the difference between the contract and the market price but agreed to treat the contract as a nullity on the return of the advance they had paid together with interest. The answer of the defendants is that the plaintiffs cannot sue them because they themselves were in default higher up in the chain of buyers and sellers. Plaintiffs did not take delivery from Venkatachalapathy Aiyar or give delivery to Hanumantha Aiyar and all the contracts down to the goods reaching the defendants were settled in one way or another, the ultimate result being that the bales were never delivered to anybody because the ultimate buyer, Venkatachalapathy Aiyar obtained a cancellation of his contract with the Madura Mills and the defendants themselves settled with Arumuga Mudaliar who got some money out of them. The short point put for the defendants is that as the plaintiffs themselves were in default higher up in the chain of buyers and sellers they cannot have any remedy against the defendants.

The first thing that emerges is that this was in effect a contract for specific goods. The bales are described and their whole history is given. On that it would be possible for Mr. Varadachariar to argue that the contract on its true construction was a contract for specific goods conditional on their reaching the hands of the defendants. But that argument is of no assistance to him, because the position would then be that its impossibility of performance having arisen though through no fault of the defendants they could not, under Indian Law, retain the moneys they had received from the plaintiffs by way of advance. I am putting it in favour

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Coutts Trotter, C. J.

of the defendants because it is quite obvious that it would be equally arguable to say that as the defendants had agreed to deliver certain bales of yarn they had put themselves in the position of warranting that the sellers in all the preceding links in the chain would fulfil their contract. In order to succeed in this suit, which I have already pointed out is not one for damages, the defendants have to go further and say that by reason of the plaintiffs' default to deliver to Hanumantha Aiyar, the plaintiffs are disentitled to take the attitude that this contract must be looked at by itself, as they were indirectly responsible by their failure to fulfil the contract with a third person for the default—the inevitable fault—of the defendants.

The point is not covered by any direct authority but it appears to me that the law on the subject is clear. The defendants undertook to deliver bales to the plaintiffs and ran the risk of a break of any one of the links of the chain which preceded their contract. In my opinion, it is a mere accident that one of those links—it may be the defaulting link—is the plaintiffs themselves. If I am right in my view that the defendants took the risk of all previous contracts being duly executed, they took the risk of the breach of the plaintiff's contracts, either with Venkatachalapathy Aiyar as buyer or with Hanumantha Aiyar as seller, as well as any other of the links. I may further point out that if the defendants were right in their contention, it would be difficult for them to justify the fact that having brought a suit against Arumuga Mudaliar and Sons. they settled it on terms whereby they put money into their pockets for this breach. In my opinion, the defendants, having contracted to deliver these bales to the plaintiffs, they cannot be heard to say that the plaintiffs are out of Court because they had been in default at an earlier stage of the series and broken a contract not with the defendants but with somebody else.

Although we listened to a very able and interesting argument from both the learned vakils, I do not myself think that it is really a matter of very great difficulty and it seems to me for the purpose of this case that it may be treated as an accident that the plaintiffs' name recurs twice in the series of buyers and sellers because I think that for the purpose of adjusting the rights of parties each contract must be considered solely by itself.

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The result is that the appeal will be allowed with costs throughout and the defendants ordered to return the deposit.

I see no justification for the plaintiffs claiming interest at the rate of 12 per cent. and I think the justice of this case will be met if the defendants, who have had the plaintiffs' money in their pocket all these years, be ordered to pay interest at the rate of 6 per cent. from the date of default, which is the 2nd September, 1921, till to-day and further interest at the rate of 6 per cent. till payment.

The other Appeal, No. 99 of 1924, will in consequence be dismissed with costs.

Viswanatha Sastri, J.

*Viswanatha Sastri, J.*:—I agree with my Lord.

A. S. V. *Appeal No. 46 allowed; Appeal No. 99 dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE VENKATASUBBA RAO.

N. K. N. Ramier and brothers, through one of the partners N. K. N. Perumal Aiyar ... *Appellant** (*Plaintiff*)

*v.*

Durwas J. Subbier and others ... *Respondents* (*Defendants and additional respondent*).

Ramier and Brothers v. Durwas J. Subbier.

*Contract—Breach of—Damages—Re-sale after long delay—Liability of purchaser from vendee—When arises.*

The plaintiff purchased from *R* some bales of yarn and sold them to the defendant. According to the contract with *R* the goods were to be paid for and taken delivery of thirty days after arrival. Under the contract between the plaintiff and the defendant, there was an express stipulation, that all the terms of the contract between the plaintiff and *R* should be embodied in the contract with the defendant and that the latter was liable to pay any loss or damage which the plaintiff might have to pay *R* by reason of the defendants' breach. As the defendant did not pay for the goods when the shipment arrived, *R* had them re-sold long after the breach, but the delay was at the instance of the plaintiff. The evidence disclosed that at the time of the breach the prices were rising though at the time of the re-sale the market had fallen. In a suit for damages against the defendant for breach of the contract, *held,* the plaintiff would get a right of action only if it is shown that the defendant by his conduct or by request wanted the time for the performance of the contract to be extended. If, however, without reference to the defendant, the plaintiff asked *R* to extend the time for performance, he could not saddle the other with any damages.

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*Appeal No. 152 of 1923. 9th November, 1925.

Ramier and Brothers *v.* Durwas J. Subbier.

*Quaere*: Whether the rule of law that a re-sale of goods not taken delivery of should be within a reasonable time after the breach is abrogated in cases where the contract gives a discretion to the seller to have the re-sale when they chose?

Appeal against the decree of the Court of the 2nd additional Subordinate Judge of Madura in O. S. No. 103 of 1921 (O. S. No. 24 of 1921 on the file of the Court of the Subordinate Judge of Madura).

*K. S. Krishnaswami Aiyangar* and *C. Krishnamachariar* for appellants.

*C. V. Ananthakrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff is the appellant. This appeal relates to damages for breach of a contract entered into by the defendant with the plaintiff. The appellant purchased from Messrs. Ralli Brothers certain yarn bales in December, 1917. Out of these he sold 24 bales to the defendant by two contracts dated 8th and 9th January, 1918. 8 bales were delivered, accepted and paid for; and out of the 16 bales it was held that 7 bales were not according to shipment and as regards 9 bales that although they were according to shipment the plaintiff has not proved any damages by reason of the defendant's breach. Although the appeal was filed with reference to the 16 bales the appellant's vakil said that he would argue the appeal only as regards the 9 bales.

According to the contract the goods had to be paid for and taken delivery of thirty days after their arrival. They arrived on 20th June and 21st September, 1918. They would have been paid for and taken delivery of on 20th July and 21st October, 1918. The plaintiff did not admittedly take delivery of these goods and Messrs Ralli Brothers sold them through Messrs. Dowden & Co., on 23rd May, 1919. The contract under which the plaintiff sold to the defendant goods which he had brought from Messrs. Ralli Brothers contained an express stipulation that all the terms of the contract between Ralli Brothers and the plaintiff should be embodied as part of the contract between the defendant and the palintiff and he was bound under the contract to pay any loss or damage which the plaintiff could have sustained by reason of the defendant's breach of the contract so far as Messrs. Ralli Brothers were concerned. The ground on which the subordinate Judge has dismissed the claim as regards these bales is that the sale by Messrs. Ralli Brothers was long after the date of the breach and that at the date of the breach there was no

Ramier and Brothers v. Durwas J. Subbier.

damage because the prices were rising. This finding is contested by the appellant. There can be little doubt that the date of the breach in law would be 20th July, and 21st October, 1918, that is on the expiry of a month after the date, when goods had arrived and notice of arrival was given. The case of the appellant is that because the contract gave the discretion to sell when Messrs. Ralli Brothers chose, the case is taken out of the rule of law that a re-sale has to be within a reasonable time after the breach and reference has been made to Benjamin on Sales, latest edition, page 854, which refers to *Jones* v. *Gibbons* (1), and which case is referred to with approval in *Pearl Mill Co.* v. *Ivy Tannery Co.* (2). The question how far in Indian Law mere discretion given in a contract to sell, if there should be a breach, can override limitation of reasonable care and reasonable time, is not free from doubt, and we do not think it is necessary to express an opinion on that point in view of the findings of fact which we have arrived at in this case. The case of the plaintiff rests on two grounds. He says "Here is a contract of indemnity. You agreed to pay me whatever loss I might have sustained by reason of not being able to perform the contract owing to your breach." The second case is that 'apart from any indemnity you have broken the contract to take delivery of the goods from me and you must pay me damages incurred by me by reason of your default.' The short answer to both of these arguments would be that the damages payable by defendant are only in law, what plaintiff would be compelled to pay Messrs. Ralli Brothers. If he chose to pay a claim which Ralli Brothers could not enforce, he cannot claim as against the defendant. The finding is and there can be little doubt that there was a long delay in the sale by Ralli Brothers which delay was at plaintiff's instance. He can get a right of action against defendant only if it is shown that defendant by his conduct or by request wanted the time of the contract to be extended. If without reference to the defendant the plaintiff had asked Messrs. Ralli Brothers to extend the time for the performance of the contract the plaintiff could not saddle defendant with any damages, if there is a finding that the delay was not reasonable. There is no evidence in this case worth the name to show that there was any request by the defendant to the plaintiff to extend the time for the performance of the contract. We find that all the letters

1. (1853) 8 Ex 920. 2. (1919) 1 K B 78.

Ramier and Brothers v. Durwas J. Subbier.

written by the plaintiff to the defendant calling on him to perform have not been replied to, and so far as the evidence goes, except the bare statement of the plaintiff's agent that the defendant said he would take delivery, there is nothing to show whether the defendant made any such promise. The fact that no reply was sent to the various demands, by the plaintiff rather suggests that the defendant did not make any such promise. What is proved against the defendant is that he in turn wrote to his constituents letters, (printed on pages 15, 29 and 32 of the printed record) asking them to pay interest as they did not take delivery of goods and as Messrs. Ralli Brothers were claiming interest. One answer is that these letters do not refer to the present bales at all and that, we think, would be a sufficient answer. We are also of opinion that the mere fact that the defendants without making any request to the plaintiffs for time just as a matter of caution wrote to their constituents to take delivery would not amount to asking for extension of time in the view we take of the case.

We may also state that so far as the pleadings are concerned the plaintiff does not anywhere in his plaint refer to any request for further time and any extension granted on such request, to justify a re-sale long after the due date.

We are of opinion that the appeal fails and should be dismissed with costs.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Yandluri Yellamanda ... *Appellant** (*Plaintiff*)

*v.*

Kunchala Chitambaram (*died*) and others ... *Respondents* (*Defendants* 1 *to* 14, 16 *to* 25, 27 *to* 45 *and* 47 *to* 54).

Yandluri Yellamanda v. Kunchala Chitambaram.

*The Madras Hereditary Village Offices Act (III of 1895) S. 21—Scope of —Service inam lands—Suit for possession—Claim based on title—Trespass alleged—Jurisdiction of Civil Courts—If ousted.*

A suit for possession of service *inam* lands, not based on the fact that the plaintiff is the holder of an office and that the land is attached as emoluments to that office, but on the allegation that the defendants were tenants holding over

*A A O No. 295 of 1923. 24th November, 1925.

Yandluri Yellamanda v. Kunchala Chitambaram.

after the expiry of a lease, is cognisable by a civil Court. The mere fact that one of the defendants claimed the land as his and denied the title of the plaintiff would not be sufficient to oust the jurisdiction of the Civil Court. Case law discussed.

S. 21 of the Madras Hereditary Village Offices Act must be read along with S. 13.

Appeal against the order of the Court of the Subordinate Judge of Bapatla dated 27th November, 1922 in A. S. No. 106 of 1922 preferred against the decree of the Court of the District Munsif of Ongole dated 17th February, 1922 in O. S. No. 587 of 1920.

*V. Ramadoss* and *V. Krishna Mohan* for appellant.
*V. S. Narasimhachari* for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS:—*Devadoss, J.*:—The plaintiff's suit is for the recovery of his 1|6th share in the plaint property. The defendants contended that the lands in respect of which the relief was claimed were inam lands and the Civil Court had no jurisdiction to try the suit. Both the Lower Courts have held that the Civil Court had no jurisdiction to try this suit. The plaintiff has preferred this Miscellaneous Appeal.

In order to determine whether the Court has jurisdiction or not we have to see what the averments in the plaint are and what is the cause of action of the plaintiff. The plaintiff sets out in his plaint that the plaint-land was granted on Cowl on 19th November, 1897 and it expired with the close of the year, Parithavi, 1912-1913, and that defendants 2 to 5 have been cultivating the land along with the 1st defendant. The plaintiff and his father with some of the defendants took possession of the plaint-property and the 2nd defendant instituted Original Suit No. 256 of 1915 on the file of the District Munsif's Court, Ongole and obtained a decree, and took possession of the property on 12th June, 1917. The cause of action is set out as having arisen on 19th November, 1897 when the 1st defendant obtained a Cowl in respect of the property, on 6th April, 1913 when the Cowl period expired, and on 12th June, 1917 when the defendants 2 to 5 obtained possession under the decree in O. S. No. 256 of 1916. Defendants 2 and 3 set up various pleas one of them being that the suit lands being service inam the Court had no jurisdiction to try the suit. The Subordinate Judge held that the suit was not cognisable by a Civil Court on the bare finding that the suit land was inam-land.

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The question is whether this suit is cognisable by a Civil Court or not. The contention of Mr. Narasimhachariar for the respondent is, that no suit in respect of any service inam-land is cognisable by the Civil Court. S. 21 of the Hereditary Village Office's Act III of 1895 is "No Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified under S. 3 or any question as to the rate or amount of the emoluments of any such offices or except as provided for in proviso (*ii*) to Sub-section 1 of S. 13 any claim to recover the emoluments of any such office." If a suit is based on the fact that the plaintiff is the holder of the office and therefore entitled to the land the possession of which he seeks, then that suit would come within S. 21. If a plaintiff brings a suit for the recovery of any land alleging that he is the holder of the office and that another person who is not the office-holder is in possession of the land that suit also would come within S. 21. But where a person sues for the possession of land which is his whether it be against a trespasser or against a co-sharer he does not base his claim on his being the holder of the office but he bases his claim on his right to the land. The mere fact that it is inam land does not mean that the cause of action is based on his being the holder of the office. S. 21 has to be read along with S. 13. S. 13 provides for a suit before the Collector " for any of the village offices mentioned in S. 3 or the emoluments of such offices on the ground that he is entitled under Sub-section (2) or (3) of S. 10 of the Madras Proprietary Estates Village Service Act of 1894 or under Sub-section 2 or 3 of S. 10 or Sub-section 2 or 3 of S. 11 or S. 12 of this Act, as the case may be, to hold such offices and enjoy such emoluments." In this case the plaintiff does not come into Court for recovery of land on the strength of his being an office-holder and that the lands being the emoluments of the office. He seeks the Court's aid for recovering possession of the property which has been unlawfully taken from him. He alleges that a Cowl was granted in 1897 and that the period of the Cowl expired in 1912-1913 and that the defendants are holding-over after the expiry of the lease that he and his father along with others took possession of the lands. The 2nd defendant filed a summary suit under S. 9 of the Specific Relief Act and got back possession from the plaintiff and his father. The main contesting defendants in this case are defendants 2, 3 and 4. The 13th defendant from whom they claim a

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portion of the land does not seem to contest the suit seriously, though the vakil for the defendants 2 to 4 appears for him as well. The contention of Mr. Narasimhachariar is that the 13th defendant claimed the land as his and therefore the suit is one for the emoluments of the office. The 13th defendant does not say that all the suit land belongs to him. He is one of the persons entitled to a share of the land and the mere fact that he denies the plaintiff's right would not be sufficient to convert the suit into one for the emoluments of an office. If the contention of the respondent is to be upheld it would mean that even though a man recovers property by a suit under S. 13 of the Hereditary Village Offices Act, if somebody trespasses on the land and asserts a claim to it, the jurisdiction of the Civil Court would be ousted. S. 21 does not take away the jurisdiction of a Court to entertain a suit for the recovery of possession of an inam land from a trespasser, or a tenant holding over or from a co-sharer who in order to defeat the plaintiff sets up a title in himself and denies the title of the plaintiff.

In *Muvvula Seetham Naidu* v. *Doddi Rami Naidu* (1) it was held "that a suit for a Village Officer's inam land on the expiry of a lease granted by such village officer to the defendant is cognisable by the Civil Courts as the plaintiff has only to prove the letting and expiry of the term and he is not called upon to prove his title which the defendant will be estopped from disputing." The learned Judges observe at page 210 :—"It is reasonable to hold, notwithstanding the apparent generality of the language of S. 21, that the jurisdiction of the Civil Court is taken away in those cases in which it is conferred on the Revenue Court by S. 13." The respondent relied strongly upon the concluding sentence of the judgment "the plaintiff will not be entitled to base his suit on the title to the inam". This sentence does not mean that if the defendant chooses to say that the plaintiff is not entitled to the land the jurisdiction of the Civil Court is ousted. What is meant by the sentence as we understand it is, that the plaintiff is not entitled to sue on his title to the inam, that is, on his being the office-holder and therefore entitled to the land. In another case in the same volume *Gavara Ramanna* v. *Adabala Rattayya* (2) the Chief Jusice and Mr. Justice Krishnaswami Aiyar held that " A suit in the Civil Courts for land, not based

1. (1909) I L R 33 Mad 208 : 20 M L J 91.
2. (1909) I L R 33 Mad 235 : 20 M L J 94.

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on the ground that such land constituted part of the emoluments of any of the offices described in S. 13 of the Madras Act III of 1895, is not barred by S. 21 of the Act." In that case the plaintiff sued for recovery of land, on the ground that they were private property of the plaintiff. The Subordinate Judge held that the Civil Court had no jurisdiction to entertain the suit on the ground that the land was inam land and that the suit was practically for the recovery of the emoluments of Naikwadi office. The learned Judges held that the suit was maintainable in a Civil Court. They observe at page 237 : "The present suit does not fall within that section (meaning S. 21). It is not a claim to succeed to any of the offices mentioned in S. 13. It does not raise the question as to the rate or amount of the emoluments of any such office." The words "any claim to recover the emoluments of any such office" under S. 21 do not apply to the present suit, since the suit is not a suit for land based on the ground that the land constitutes part of the emoluments of the office." In the present case the plaintiff does not base his suit for the recovery of the land on his being the holder of the office and that the lands constitute the emoluments of the office. The observation of the learned Judges are applicable to the present case.

The case *Kesiram Narasimhulu* v. *Narasimhulu Patnaidu* (3) does not apply to the present case. There the plaintiff sued to recover possession of the land alleging that it was the emoluments of his office of Karnam and that the defendant resisted the plaintiff's claim on the ground that the land was not the emoluments of his office but the private property of the plaintiff which passed to the defendant in execution of a decree obtained by him against the plaintiff. The plaintiff's land was attached in execution of a decree for money and in spite of the objection made by him on the ground that the attachment was prohibited by S. 5 of Act III of 1895 (the land being Karnam's inam), it was brought to sale and purchased by the defendant. He then sued before the Collector for recovery of the land alleging that he was a karnam and that the land was the inam attached to the office. The Board of Revenue on second appeal gave a declaratory decree in favour of the plaintiff as to his title to the assessment of the land leaving him to sue if so advised, in a Civil Court to recover possession of the land. The plaintiff sued in the Civil

3. (1906) I L R 30 Mad 126 : 16 M L J 333.

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Court. But on a difference of opinion between two learned Judges the matter came up before a Full Bench. The plaintiff did not deny the debt nor did he seek to set aside the sale on any ground other than the inalienability of the land. As observed by Miller, J. at page 131 : "He can therefore only succeed by showing (1) that he is the Karnam of the village entitled as such to enjoy the emoluments, and, (2) that the lands for which he sues is the emolument of his office. These must be the grounds of his suit and these are the grounds which give him his right of action before the Collector under S. 13 (1)." The Full Bench held that the suit was for the emoluments of a village office based upon the title of the plaintiff as the holder of the office. As already observed, the plaintiff herein does not base his claim as being the holder of the village office.

In *Kotiah* v. *Reddamma* (4) Seshagiri Aiyar, J. held that Act III of 1895 was not intended to take away the jurisdiction of the Civil Court where trespass is alleged against the defendant. This decision was upset in L. P. A. Nos. 105 and 106 of 1916 on the facts, by a Bench consisting of Spencer and Phillips, JJ. [vide *Pattayya* v. *Kotiah* (5)]. The learned Judges held that the suit "was essentially one for the recovery of the emoluments of a carpenter's or blacksmith's service inam. They observe at page 8 : " In suits where the plaintiff seeks to recover on the ground of a bare trespass and no question of title is involved as in *Muvvula Seetham Naidu* v. *Doddi Rami Naidu* (1), or, on the ground that the land is private property as in *Gavara Ramanna* v. *Adabala Rattayya* (2) the suit is not based on any cause of action out of the plaintiff's right to recover the property as an emolument of an office and in such cases the Civil Court's jurisdiction may not be ousted. In such cases it is not necessary that the plaint should contain any mention of the fact that the land is an emolument of an office." This observation is applicable to the present case.

Mr. Justice Spencer and Mr. Justice Ramesam observe in *Vanchinatha Aiyar* v. *Rajagopala Aiyar and others* (6) : "Of course a suit in which the plaintiff does not need to rely on his right to the office and its emoluments in order to succeed,

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1. (1909) I L R 33 Mad 208 : 20 M L J 91.
2. (1909) I L R 33 Mad 235 : 20 M L J 94.
4. (1916) I M W N 278.
5. (1917) M W N 7.
6. (1921) 41 M L J 372.

such as would be the case in the instance cited in the words of Subramania Aiyar, J. at page 210 of *Muvvula Seetham Naidu* v. *Doddi Rami Naidu* (1) stands on a different footing meaning that such a suit is not exempted from the cognisance of a Civil Court by S. 21 of the Hereditary Village Offices Act.

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The principle of these decisions is that a suit for possession of land not based on the fact that the plaintiff is the holder of the office and that the land is attached to that office, is cognisable by a Civil Court. The mere fact that the defendant denies the title of the plaintiff would not be sufficient to oust the jurisdiction of the Civil Court.

In the result the judgments of the Lower Courts are set aside and the suit is remanded for disposal on the merits. The plaintiff will have his costs of Civil Miscellaneous Appeal and the costs of the suit in the Lower Courts will abide its result.

*Wallace, J.*:—I agree. I have nothing to add.

Wallace, J.

T. S. V. *Appeal allowed and suit remanded.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Hari Krishna Chettiar ... *Appellant** (*Respondent*)

*v.*

Govindarajulu Naicker ... *Respondent* (*Petitioner*).

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*The Guardians and Wards Act, Ss. 34 (d), 43 (1) and 47—Direction to file accounts—Power of Court to scrutinise accounts—Guardian if can be ordered to deposit sums found due—Scope of S. 34 (d)—Order if appealable—Procedure.*

S. 34 (*d*) of the Guardians and Wards Act does not empower the Court to direct the guardian to pay into Court more than the amount shown to be due in the accounts exhibited by him. The words "on those accounts" in S. 34 (*d*) should not be treated as mere surplusage.

On the application of a relation of a ward of Court, the District Judge directed the guardian appointed under the Act to file his accounts into Court. The accounts were thereafter scrutinised by the Judge, who found that the sum actually due by the guardian was more than what was admitted by him in his accounts. The Court thereupon ordered him to deposit in Court the sum so found due. *Held,* the order was one passed under S. 43 (1) and not under S. 34 (*d*) and was appealable. *Radha Kishan* v. *Khushi Ram,* 67 I C 309 dissented from; *Jagannath* v. *Mahesh,* 25 C L J 149 followed; *Sita Ram* v. *Mussamat Govindi,* I L R 46 All 458 referred to.

*Semble.*—Where on accounts being filed by the guardian the measure of the guardian's liability is sought to be put in issue, the proper course is to apply

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*A A O No. 228 of 1924. 13th November, 1925.

1. (1909) I L R 33 M 208: 20 M L J 91.

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to the Court under S. 35 or S. 36 and then file a regular suit against the guardian.

Appeal against the order of the District Court of Coimbatore dated 20th March, 1924 in I. A. No. 227 of 1923 in O. P. No. 242 of 1912.

*C. S. Venkatachari* and *V. Narasimha Aiyangar* for appellant.

*S. Muthiah Mudaliar* and *M. Krishna Bharati* for respondent.

The Court delivered the following

JUDGMENT:—The question of law that is raised is one of some difficulty. The appellant was appointed guardian of the property of his nephew in 1912. On an application in 1923 made by a relation of the ward, the District Judge directed the guardian-the appellant—to file his accounts into Court. They were filed accordingly and scrutinised by the District Judge who found that the sum actually due by the guardian to the minor's estate was Rs. 2,180, a sum considerably more than that admitted in the accounts.

The appellant questions in this appeal the correctness of the finding. Mr. Muthiah Mudaliar for the respondent, the applicant in the Lower Court, takes a preliminary objection that no appeal lies from the order in question. His contention is shortly this. The order of the Lower Court is made under S. 34 (*d*) and this does not fall under S. 47 which specifies the orders that are appealable. It is doubtless true that under the Act an appeal does not lie from an order made under S. 34 (*d*).

The real question, however, is, does the present order come within the terms of S. 34 (*d*)? S. 34 may be thus summarized: " Where a guardian of the property of a ward has been appointed or declared by the court, he shall

(*a*) if so required by the court, give a bond engaging to duly account for what he may receive;

(*b*) if so required by the Court, deliver to the Court within such time as the Court directs a statement of the property of the ward received by him and of the debts due by the estate;

(*c*) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs;

(*d*) if so required by the Court, pay into the Court at such time as the Court directs the balance due from him on those accounts or so much thereof as the Court directs; and

(*e*) apply for the maintenance of the ward such portion of the income of his property as the Court directs and if the Court so directs the whole or part of that property."

We have given a summary of the section, but so far as clauses (*c*) and (*d*) are concerned we have reproduced them verbatim.

Can it be said that the order made falls under clause (*d*)? There is not even as much as a hint in the section that what are dealt with by it are questions of a contentious nature. On the contrary it seems to refer to proceedings where there can possibly be no conflict between the guardian and his ward, that is, matters which may be regulated by the Court in the exercise of its disciplinary jurisdiction. Executing a bond, filing an inventory, exhibiting accounts and applying the income or corpus for the support of the ward—all these surely come under this category. In the light of this, now let us examine the section. Under clause (*c*) the guardian if required by the Court is bound to exhibit his accounts. Clause (*d*) says that if required he shall pay into the Court "the balance due on those accounts or so much thereof as the Court directs." This means that he can be called on to pay into Court only either the whole or a portion of what is admitted by himself. The use of the words "on those accounts" is significant. He cannot be required to pay the amount actually found to be due from him but only the amount due " on those accounts," that is the accounts exhibited by him. If the intention of the legislature was that the Court should have the power under this section to compel the guardian to pay the actual amount found due, the clause would not have contained these words. If the clause is read deleting these words, then there can be no question that the guardian can be called on to pay the actual amount due. These words must not be treated as merely superfluous but full effect must be given to them. As a question of construction, we are clearly of the opinion that this clause does not empower the Court to direct the guardian to pay into Court more than the amount shown to be due in the accounts exhibited by him.

We must construe the clause having regard to the scope of the whole section and to the place where the section occurs.

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Can it be said that what is contemplated is a decision of substantive rights of the parties? In this connection we may also notice S. 45 which prescribes, *inter alia*, the penalty for disobedience of the order made under S. 34 (*d*). There again the words "on those accounts" are repeated. We cannot lightly disregard the repetition of these words.

In *Radha Kishen* v. *Khushi Ram* (1) the learned Judge having held that a similar order fell under S. 34 (*d*), felt surprised that under the Act an order of such importance is not appealable. In our opinion the fact that there is no appeal is an additional reason for holding that the order does not really come under S. 34 (*d*). We are not prepared to impute to the legislature an intention which leads to such a drastic result.

The view we are disposed to take receives support from the judgment of Mookerjee, J., in *Jagannath* v. *Mahesh* (2). In that case, the Lower Court purported to make under S. 34 (*d*) an order directing the guardian to bring into Court a sum of money not shown in the account filed by him under cl. (*c*). The guardian failed to comply with the order and the penal provision of S. 45 was then put in force against him. The Calcutta High Court held that the original order was one not rightly made under S. 34 (*d*) and consequently it could not be enforced under S. 45.

Then comes the question, has the Court power under the Act to make such an order at all? In *Sita Ram* v. *Musammat Govindi* (3) the learned Judges observe that to deny to the Court this power would lead to grave inconvenience and possibly injustice and having said this, they seek to find the power in S. 34 (*d*). We are unable to agree with this reasoning. Immediately following S. 34 are two sections, S. 35 dealing with suits against guardians where administration bond is taken and S. 36 suits where such bond is not taken. The juxtaposition of these three sections seems to indicate that when the measure of the guardian's liability is put in issue, the proper course seems to be to apply to the Court under S. 35 or S. 36 and then file a regular suit against the guardian.

The sections we have examined point to this, a guardian can be directed under the Act to pay into Court the amount admitted by him; but if it is sought to make him liable for a larger amount than is admitted, the question can be decided

1. (1921) 67 I C 309. 2. (1916) 25 C L J 149 at 153.
3. (1924) I L R 46 A 458.

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only in a regular suit. Were we to decide the point on a rigid interpretation of the sections of the Act, we should feel inclined to hold that it is not competent to the Court to make under the Act an order such as the one in question.

The present order would then be a nullity as having been made without jurisdiction, but this is not the position for which either side has contended.

The cases cited to us show that in several instances it was assumed or decided that such a power is possessed by the Court. We have already referred to *Sita Ram* v. *Musammat Govindi* (3), where considerations are urged in favour of holding that it is within the competency of a Court to make such an order. If it is absolutely necessary to find this power somewhere within the four corners of the Act, S. 43, by straining it somewhat, may be pressed into service. The first clause of that section reads thus:—

"The Court may on the application of any person interested or of its own motion make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court."

It may not be quite the right thing to say that an order of the kind under discussion is "an order regulating the conduct of proceedings" of a guardian. But it is only by construing these words in this rather wide sense, that we can find justification in the Act for the view that has been uniformly adopted in the cases cited to us, that such an order as this is within the competency of a Court acting under the Guardians and Wards Act. There is, however, this much to be said for this view, that the order in that case is not final but is appealable. The preliminary objection thus fails.

Turning to the facts, Mr. Venkatachari objects to the inclusion of two items, namely, Rs. 125-1-0 and Rs. 225-10-0, but we are not prepared to hold that the District Judge's decision on this point is wrong.

His next objection is well founded. There is no sufficient reason given for awarding compound interest at 12 per cent. with yearly rests. The guardian no doubt is accountable for the moneys from the date he realised them. Although he failed to keep separate accounts and mixed his ward's moneys with his own, it has not been proved that the profit that he earned by the use of the ward's moneys was such as to justify the direction in question. It has not been shown that the moneys had throughout been lent out on interest. Nor

3. (1924) I L R 46 All 458.

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is there any evidence that when interest was realised it was again lent out. For what period any sums were lent out and how much moneys was so invested, on these matters there is no evidence worth mentioning. There is no warrant for presuming that every pie of this money had throughout been invested, that the interest was annually received, and that it was forthwith from time to time again lent out. In the circumstances, a direction to pay 12 per cent. simple interest will meet the ends of justice.

In regard to the memorandum of objections there is only one point that arises. Before the guardian disposed of the minor's properties he was undoubtedly in possession and for this period he is accountable for the profits. On the evidence we find that Rs. 500 would be a fair estimate and deducting from this Rs. 60 for cist, the appellant will be liable to pay Rs. 440 on this head.

Adding Rs. 440 to Rs. 2,180, the amount allowed by the District Judge, the principal sum which the guardian is liable to pay amounts to Rs. 2,620. This will carry simple interest at 12 per cent. from the 1st November, 1913, to this date, and in calculating interest the guardian will be allowed Rs. 60 annually for maintenance expenses from 15th May, 1914 to 30th June, 1919. Counter interest will be allowed to the appellant on Rs. 1,010-15-3 from 11th October, 1923, the date when he paid that amount into Court. Interest will run at 6 per cent. per annum from this date on the aggregate amount found due. The order of the District Judge will be modified accordingly. Each party will bear his costs. The appellant wants time for payment till the 14th December, 1925, and the respondent does not object. The appellant shall pay the amount into the District Court of Coimbatore on or before the 14th December, 1925.

T. S. V. *Order varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

The Secretary of State for India in Council ... *Appellant** (*Petitioner*)

*v.*

Sarvepalli Venkatalakshmanna ... *Respondent* (*Counter-petitioner-plaintiff*).

Secretary of State for India *v.* Sarvepalli Venkatalakshmanna.

*Civil Procedure Code, O. 33, R. 10—Court-fee payable to Government—Recovery of—Right of—Method of—Future maintenance—Plaintiff's property confined to.*

The contention is not tenable that Government cannot under a decree recover the Court-fee decreed as payable to Government from a pauper plaintiff, whenever plaintiff's property is confined to a right to future maintenance.

The proper method of recovering such Court-fee is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments, if necessary, in order that plaintiff may have something to live upon) the fee due by plaintiff.

Appeal against the order of the District Court of Nellore dated the 2nd November, 1923 in E. P. No. 124 of 1922 (O. S. No. 61 of 1921) Subordinate Judge's Court, Nellore.

The Government Pleader (*C. V. Ananthakrishna Aiyar*) for appellant.

*B. Somayya* for respondent.

The Court delivered the following

JUDGMENT:—We cannot subscribe to respondent's contention that Government cannot under a decree recover the court-fee decreed as payable to Government from a pauper plaintiff, whenever plaintiff's property is confined to a right to future maintenance. That contention is negatived by the Privy Council ruling in *Rajindra Narain Singh* v. *Sundara Bibi* (1), which also indicates the proper method of recovering such court-fee. That method is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments if necessary in order that plaintiff may have something to live upon) the fee due by plaintiff. The appellant's execution petition as it stands does not ask for relief in that form, and it should be amended. We grant leave to amend it accordingly. The amended petition is forwarded to the Lower Court for disposal in the light of the Privy Council decision quoted above. Each party will bear his own costs in this appeal.

A. S. V.

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*A A O No. 186 of 1924. 4th January, 1926.

1. (1925) I L R 47 All 385 : 49 M L J 244 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

The Secretary of State for India in Council represented by the Collector of South Arcot ... *Appellant**

*v.*

Tripurna Sundarammal and another ... *Respondents (Plff. and Defendants).*

Secretary of State for India *v.* Tripurna Sundarammal

*Civil Procedure Code, O. 33, Rr. 10 to 13—Suit in* forma pauperis—*Decree passed—Court-fee payable—Basis of—Amended Court Fees Act coming into force—Effect of—Liability of plaintiff—Application to Court below under R. 10 if necessary—Relief awardable in appeal.*

Subsequent to the institution of a suit *in forma pauperis* the Court Fees Act was amended and the amended Act came into force prior to the passing of the decree. *Held,* the amount of Court-fee payable under O. 33, R. 10 is the amount calculated as on the date when the plaint was filed and not on the date of the passing of the decree.

Where the plaintiff's suit is decreed only in part, he is bound to pay the difference between the total amount payable on the plaint and the amount which is ordered to be recovered from the defendant on the portion of the claim which is decreed. An application for such directions need not necessarily be made to the Trial Court, and the Court hearing an appeal can pass the necessary order.

Appeal against the order of the District Court of South Arcot dated 7th October, 1922 in O. S. No. 42 of 1921.

The Government Pleader (*C. V. Ananthakrishna Aiyar*) for appellant.

*K. Balasubramania Aiyar* and *M. S. Venkatarama Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The 1st respondent brought a suit in *forma pauperis* against the 2nd respondent for maintenance. The suit was compromised by the parties and a decree in terms of the compromise was passed. The District Judge held that the court-fee payable by the 1st respondent was that which was made payable by the recent amendment of the Court Fees Act. Against that order the Government have preferred this appeal. The order of the learned District Judge in calculating the court-fee payable on the plaint according to the rate prevailing on the date of the decree is bad. Under O. 33, R. 10 the amount of court-fee payable is that which is payable on the date of the plaint. O. 33, R. 10 says that "the Court shall calculate the amount of court-fees which would have been paid by

*A A O. No. 144 of 1923. 13th November, 1925.

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the plaintiff if he had not been permitted to sue as a pauper." When a person brings a suit he pays court-fee on the amount of relief claimed in the plaint, or on the valuation in the plaint, and the court-fee is paid before the plaint is admitted and filed as a suit. Therefore the amount payable by the 1st respondent in this appeal is that amount which was payable on the date when she filed her plaint.

The next question is whether this Court should vary the decree of the District Judge by directing the plaintiff to pay the difference between the amount decreed and the amount payable. Following the principle of the decision in *Chandrareka v. Secretary of State for India* (1) we hold that the plaintiff is bound to pay the difference between the Court-fee payable by her and the amount which is ordered to be recovered from the defendant, for, it is for the plaintiff to pay the Court-fee on her plaint and the defendant is only bound to pay on the amount which is decreed against him. Mr. Venkatarama Aiyar's contention is that the Government Pleader should apply to the Lower Court for an order under R. 10. R. 12, no doubt, gives the right to the Government to apply to the Court to make an order for the payment of Court-fees under R. 10 or R. 11. But it is not necessary that an application should be made to the Lower Court before the Government can appeal against any of the terms of the decree. Under R. 13 any order passed under R. 10, R. 11 or R. 12 shall be deemed to be questions arising between the parties to the suit within the meaning of S. 47. There being a decree in which a certain amount is mentioned as due to the Government, it is open to the Government to appeal against that portion of the decree, and, therefore, it is not necessary that an application should previously have been made to the Lower Court for what the Government considers as the proper Court-fee. The Court-fee payable by the 1st respondent will be Rs. 315 *minus* Rs. 20-3-6. It is agreed that the 1st and 2nd respondents will pay in proportion of 5 to 2. As the Government Pleader has appealed against the order of the Lower Court as a matter of principle is involved we leave it to the Government to consider whether in a case like this it would be necessary to get the full amount from the 1st respondent who is a widow and who brought the suit for maintenance. There will be no order as to costs of the appeal.

T. S. V. *Appeal allowed.*

1. (1890) I L R 14 Mad 163.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Tadanki Brahmayya (*died*) and others . . *Appellants** (*Defendants* 1 *and* 2 *and L. Rs. of the* 1*st defendant*)

*v.*

Puvvula Madhuram and another .... *Respondents* (*Plaintiff and* 3*rd defendant*).

Tadanki Brahmayya *v.* Puvvula Madhuram.

*Inam*—Sarva Dambala Inam—*Significance of—Dancing girls—Temple services*—De facto dharmakartha—*Power of, to call for performance of services—Dismissal on default—Power to make new appointment.*

Where lands were granted as *Sarva Dambala Inam* to certain dancing girls long before the Permanent Settlement for the purpose of rendering service in a temple, a *de facto dharmakartha* of the temple is not entitled to call on them to perform service and on default to dismiss them and appoint others in their place. The position might be different if at the time of dismissal, the *de facto* trustee had completed his right as trustee by prescription.

The expression *Sarva Dambala Inam* only shows that no money payment was insisted on the holding of the *inam* and not necessarily that it was not a service *inam*.

Second Appeal against the decree of the District Court of Kistna at Masulipatam in A. S. No. 11 of 1922 preferred against the decree of the Court of the Principal District Munsif of Gudivada in O. S. No. 435 of 1919.

*S. Varadachari* and *V. Krishna Mohan* for appellants.

*V. Ramadoss* for respondents.

The Court delivered the following

JUDGMENT:—The facts out of which this second appeal arises may be stated as follows:—

In the Zemindari of Telaprolu there is a village called Pamulapadu. In the village there is a temple dedicated to Sri Chidanandeswara Swami and it is said that the suit inam was granted to certain dancing girls long before the permanent settlement for the purpose of rendering service in the temple. In the year 1904 the Tahsildar of Nuzwid started an enquiry on the question whether the services were being properly performed by the dancing girls in the temple and whether therefore the Government ought not to resume the inam. The correspondence dealing with this matter consists of Exs. C to G during the years 1904 and 1905. Finally the Government placed the inam under attachment and began to collect assessment on the inam. Ex. G is the final order of the Collector.

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*S A No. 104 of 1924. 18th November, 1925.

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It appears from it that at that time, the services were not being rendered for the preceding 15 years. The manager of the Telaprolu estate says in Ex. F "there is little or no probability of the Kalyanothsavam in the Pamulapadu temple being performed in the near future." Ex. G shows that the service was not rendered by the dancing girls for some time because the Utsavam at which such services had to be rendered was not performed. They were willing to render service if the Utsavam is resumed. In 1911 the Zemindar of Telaprolu executed a deed of gift (Ex. Q) giving the suit village of Pamulapadu in favour of his brother-in-law Gangadara Ram Rao and his sons. The gift was followed by a sub-division and now the donee is regarded as the proprietor of the village paying a separate Peishkush. He then began to take steps to get the services in the temple properly rendered and to revive the Kalyanotsavam. He issued two notices on 23rd August, 1912 and 21st October, 1912 to the representatives of the service holders, namely, the present defendants 2 and 3. To these they replied by Exs. H and J denying that the land was a service inam and that they were liable to render service in Kalyanotsavam, *etc.*, festivals. After this denial the proprietor appointed the plaintiff for the purpose of rendering service in the temple. This was in June, 1913. Meanwhile, in 1913 by Ex. K. the Government released the inam from attachment and informed the trustee that he could take such action as he thought fit to secure the revival of the services. In 1915 by Ex. P the proprietor called upon the defendants 2 and 3 to render services in the temple. In this notice he says that as he entertained some doubt as to the legality of the prior notices, a fresh notice was issued. He also calls upon them to appear before the Tanadar of Pamulapadu on 8th May, 1915 to show cause why they should not be dismissed from service. He entertained doubts as to the legality of the earlier notices apparently because they were issued at a time when the inam was under the attachment of Government and when the Government was collecting assessment on the inam. Soon after the notice, Ex. P, the proprietor seems to have filed a suit to recover possession of the suit inam. That suit was dismissed on the ground that the right of resumption was not in the Zemindar but in the Government and that the proper person to recover the inam from the defendants would be the new appointee to the office. Thereupon the present plaintiff who was appointed in June, 1913 filed this suit in

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August, 1919. Both the Lower Courts decreed the suit and the defendants have filed this second appeal.

Mr. Varadachari who appears for the appellants raises four points:—

1. Whether the inam was a service inam held on condition of rendering service in the temple?

2. Whether the donee under Ex. Q was the lawful Dharmakartha of the temple and was entitled to call upon the defendants to perform service and dismiss them on disobedience and appoint the plaintiff or other person to the office?

3. Whether the plaintiff is entitled to mesne profits? and

4. Whether the inam consisted of melvaram only or both melvaram and kudivaram?

On the 1st question as to the nature of the inam I will refer to the documents not with a view to give my finding but merely to show that probably there was a genuine doubt in the minds of the defendants as to the nature of the inam. The earliest document Ex. XIV which is an extract from Oake's Register of Inams for Fasli 1797 shows that the suit inam was described as Mokhasa. It was granted to one Balaguruvi in Fasli 1172 by Narasimha Appa Rao, the Zemindar of Nuzwid. The other documents, Ex. XIV series, also extracts from Oake's Register of Inams, show that in the case of other service inams they were not shown as Mokhasa but as inam expressly describing the service. For instance in Exs XIV, XIV (*b*), XIV (*e*) and XIV (*h*) the inam is described as inam to carpenters and blacksmiths for repairing the vahanams of Swami-varu. In Exs. XIV (*c*), XIV (*d*) and XIV (*f*) the services are described as Bajanthri, *etc.*, for the performance of Utsavams in Ayilur Swami Temple. Then another set of documents Exhibits II, III and IV were also relied on. In Ex. II the suit inam appears under the head "Sarva Dambala Inams" so also in Exs. III and IV. The phrase "Sarva Dambala Inam" was also relied on in the Lower Courts and before me to show that it was an absolute inam and not subject to any service. I am merely expressing an opinion and not giving a finding on the issue. I rather think that the phrase "Sarva Dambala Inam" was only meant to show that no money payment was insisted on the holding of the inam and it does not necessarily show that it was not a service inam, and this opinion is supported by the contents of Ex. XII. The inam came up before the Inam Commissioner in 1860 for consideration, and it was held that the land was inam held for Devadayam service and it was confirmed to the then holders under R. III, cl. I to

be held so long as the service was rendered. Of course no quit rent was imposed. In column 8 it is stated that the inam is held for service as dancing girls. Govindamma, the grandmother of the present defendants, was then mentioned as 'the present owner'. It is said that she was aged 70 and the present 2nd and 3rd defendants' names do not appear as members of the family. Exs. V, VI, VII and VIII are Cowles relating to inams in the suit village after the inam settlement and here again the inam is described under the heading "Sarva Dambala". I need not make any further comment on this phrase "Sarva Dambala," as I have expressed my opinion in the matter.

In 1905 the defendants 2 and 3 seem to have expressed their willingness to render service when the Kalyanotsavam was performed. (*Vide* Ex. G). Somehow they did not then raise the question as to the nature of the tenure. But when they thought that they may well raise the question as to the nature of the tenure on which the inam was held they send Exs. H, J, in reply to the notices of the proprietor, denying that it was a service inam. In Ex. L, however, they seem to be more guarded in their tone than in Exs. H and J, their previous replies. In Ex. L they say:

"We shall act in whatever manner the Court may decide. As it is a dispute relating to liability to do service, we will not get any justice by an enquiry by your officials. I therefore pray that justice may be got rendered through Court. We have therefore submitted this."

It seems that they would not be satisfied with the result of an enquiry by the Tanadar before whom they were asked to appear by Ex. L. They wanted the decision of a Court. If the Court was of opinion that it was a service tenure, they were willing to render service. Though this intention was not expressed in so many words it is clear from their attitude in their written statement in the suit that such was their intention. In paragraph 4 they say:

"While the defendants are raising *bona fide* contentions to the effect that it is not service inam, he (the Dharmakartha) should get it established, through Court, that the suit inam is a service inam and then he should give the defendants an opportunity to serve and if they (defendants) fail to do so, he should get them (defendants) removed from service through Court and should appoint another. The appointment of plaintiff made without having recourse to the above procedure is not proper. If in this suit the Court is of opinion that it is a service inam, the defendants are ready to do service or get service done."

Therefore their willingness to render service after decision by the Court is expressly stated.

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I now pass on to the second point raised by Mr. Varadachari, namely, whether the proprietor is the lawful Dharmakartha of the suit temple. The deed of gift, Ex. Q, does not expressly purport to transfer the legal rights of trusteeship in respect of the suit temple in the village to the donee. It is unnecessary to observe that even if it purports so to transfer it is invalid—see *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (3). It may be that there was an impression in the minds of the donor and the donee that the trusteeship has passed to the donee along with the gift. The Courts below, in dealing with this point, find that the Archakas in performing the Svasthivachakam are now mentioning the name of Gangadhara Rama Rao. This, of course, is a finding of fact. But if there is no valid transfer of the trusteeship the fact that the Archakas thought that the present proprietor of the village was the Dharmakartha and mentioned his name at the time of Svasthivachakam does not make him a Dharmakartha. It is said that the Government recognised the present proprietor as the Dharmakartha, but this is not very clear. The District Munsif erred in saying that in Exs. C to K the Government recognised the donee as the Dharmakartha, for Exs. C to G were addressed to the Zemindar of Telaprolu. Exs. H and J had nothing to do with Government. Only Ex. K was addressed to the present proprietor by Government. But it can scarcely be relied on as the considered opinion of the Government on a question of this kind which was never raised before them and was neither discussed nor adverted to in the letter, the only object of which was to release the inam from attachment. It is also said that the defendants themselves recognised the present proprietor as Dharmakartha in Exs. H and J. But Exs. H and J are mere replies to notices in which the proprietor described himself as Dharmakartha. The same remark applies to Ex. L. All these documents show that the defendants merely repeated the description which the proprietor applied to himself. But even assuming that they intended anything more, their admission that he was Dharmakartha cannot make him Dharmakartha, if otherwise he was not the Dharmakartha. These transactions would not estop them from raising that point, for it cannot be said that these letters induced him to change his position for the worse. It follows

3. (1876) I L R 1 Mad 235 (P C).

that the proprietor is not the *de jure* Dharmakartha of the temple. Mr. Ramadas says that even if he was not the *de jure* Dharmakartha he was certainly the *de facto* Dharmakartha, and therefore, he was entitled to appoint. He relies on the decisions in *Benarsi* v. *Altaf Husain* (4), *Muiz-ud-din* v. *Mahomed Ikhlaq* (6), an unreported judgment in S. A. No. 107 of 1923 and the observations at page 82 in *Sheo Shankar Gir* v. *Ramshewak Chowdhri* (5).

In *Benarsi* v. *Altaf Husain* (4) it was held that the *de facto* Muthavalli of a mosque can sue to remove a person who is infringing on the rights of the mosque and the defendant who is infringing on the rights of the mosque could not challenge the position of the *de facto* Muthavalli. In *Muiz-ud-din* v. *Mahomed Ikhlaq* (6) it was held that the son of the prior *de facto* Muthavalli could obtain refund of a payment made by the father provided he credits it to the trust and uses it for the purpose of the trust. In S. A. No. 107 of 1923 it appears that the point taken for the defendants was that the plaintiff was not the sole trustee. It was found that the plaintiff's father and grandfather were looking after the pallivasal from 1869 onwards and though it was not very clear it looked as if the plaintiff was one of the persons who might have acquired the trusteeship by prescription or by exercising the right for a long time, *i. e.*, from 1867 onwards. But the suit was only against the tenant for possession of the site leased. The principle in all these three cases seems to be that a trust shall not fail for want of a lawful trustee and that where the defendant is doing something unlawful or something to the detriment of the trust even a *de facto* trustee should be allowed to *maintain a suit* for the benefit of the trust or institution. In the present case the suit is not on behalf of the trust or institution, nor is there any question of a *de facto* manager maintaining a suit on behalf of the trust. All that can be said is that the *de facto* Dharmakartha called upon the defendants to perform the services, dismissed them and appointed the plaintiff in the interests of the institution. The question therefore is whether the *de facto* Dharmakartha can put an end to the tenure which was being held by the defendants and give it to another. I therefore think that these decisions relied on do not apply here. In *Sheo Shankar Gir* v. *Ramshewak Chowdhri* (5) it was held that

4. (1921) 63 I. C. 171. 5. (1896) I. L. R. 24 C. 77.
6. (1923) 74 I. C. 756: 21 A. L. J. 516.

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where there was an alienation on behalf of an institution for the purpose of the institution, the alienee dealing with the *de facto* manager *bona fide* ought to be protected, and reference was made to *Hanuman Prasad's case* (7). It has only to be observed that no question of that kind arises in the present case.

I therefore think that the porprietor was not entitled to dismiss the defendants and appoint the plaintiff. I have no doubt that by 1923 or 1924 by adverse possession the present proprietor has completed his right as trustee by prescription and probably he would be entitled to call upon the defendants to render service hereafter. But it cannot be said that he was entitled to do this in 1912 when he issued notices to which Exs. H and J were replies or in 1915 when he issued Ex. P, and I may express the hope that the defendants would not take the risk of denying their liability to service hereafter if the present proprietor calls upon them to render services again. But so far as the present suit is concerned, on this ground, I think the appeal has to be allowed.

Though no doubt their attitude in Exs. H and J may be said to be the cause of the whole trouble, they assumed a much better attitude in Ex. L and also in the written statement and though it looks as if they have succeeded by a fluke which somewhat looks like a technical point, there has been no misconduct during the trial of the case. With regard to the nature of the tenure, as I have set forth in the beginning of this judgment, I think there is very good justification for their being anxious to have the decision of the Court on the nature of the inam, and it cannot be said that their conduct was contumacious whatever might be said as to the result of their denial that the suit land is service inam. I express no opinion on the point, *i. e.*, how far their attitude while denying the service tenure would have helped them, if the suit is otherwise maintainable. Seeing that they have succeeded on the other point I do not see why they should be deprived of their costs. It is unnecessary to express any opinion on the 3rd and 4th points raised by Mr. Varadachari.

The result is this appeal is allowed and the suit is dismissed with costs throughout.

T. S. V. *Appeal allowed and suit dismissed.*

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7. (1856) 6 M I A 393.

# PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD PHILLIMORE, LORD BLANESBURGH AND SIR JOHN EDGE.

Lal Chand Marwari and others ... *Appellants**

*v.*

Ramrup Gir and another ... *Respondents.*

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Lal Chand Marwari *v.* Ramrup Gir.

*Hindu Law—Endowed properties of Math or Asthal—Unlawful alienation thereof by Mahant—Suits by succeeding Mahant for recovery thereof—Disappearance of first Mahant—Death not proved after two years' absence—Succeeding Mahant's suits dismissed for want of cause of action—Fresh suits 21 years later—Presumption as to first Mahant's death—Date of death unknown—Evidence Act (I of 1872), S. 108—Limitation Act (IX of 1908), Sch. I, Art. 144.*

In 1892, the Mahant *B* of an Asthal went on a pilgrimage, having about two years previously alienated by mortgage or sale the endowed lands belonging to the Asthal. In April, 1895, *R,* his senior Chela and officiating Mahant, who, hearing that he had died in April 1892, had installed himself in due form in the office, instituted suits against the persons in possession of the said properties, alleging that *B* had alienated them unlawfully and without legal necessity. The defendants disputed the fact of the death of *B,* and questioned *R's* right to sue; and the High Court, on the 30th November, 1897 (affirming the decree dated the 27th January, 1896 of the Subordinate Judge, Muzafferpur) dismissed the suits, holding that *R* had *not proved that* at the time when he instituted the suits, *B was dead,* and accordingly that *R* had no cause of action. In 1905 *R* again went through the ceremony of installing himself as Mahant, and, on the 30th November, 1916 (by which time the defendants had been more than 26 years in continuous possession of the aforesaid properties) brought fresh suits for the recovery of the properties, alleging that (1) the Courts in his prior suits had held that *B was alive* at the time of the institution thereof (April 1895), and (2) the presumption as to *B's* death under S. 108 of the Evidence Act (I of 1872) only arose on the 30th November 1904 *i. e.* 7 years from the date of the judgment on appeal of the High Court in the previous suits; hence, he was within the limit of time, 12 years, prescribed by either Art. 134 or Art. 144 of Sch. I to the Limitation Act (IX of 1908) for bringing the present suits.

*Held,* (1) he was in error in interpreting the finding of the Courts in the prior suits to mean that *B was alive in* 1895 *or* 1897, when such finding had not gone beyond stating that the plaintiff had *not* then *proved* that his predecessor was *dead* at the date of the institution of those suits; (2) it was an error also to suppose that the effect of S. 108 of the Evidence Act was to fix the date of *B's* death at either the year 1902, or 1904, or at any other time. The presumption contained in that section is only as to the fact of death, and not as to its date, which still remains to be proved by evidence, like any other fact. As the presumption arises whether the period of disappearance is exactly seven years, or exceeds it, the language of the section would be more accurate, if, instead of the words "seven years," it read "not less than seven years." *Rango. Balaji* v. *Mudiyeppa,* (1898) I L R 23 Bom 296 and *In re Phene's Trusts,* (1869) 5 Ch 139 referred to. In this respect, the law in India and the

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*P C Appeal No. 34 of 1924. 5th December, 1925.

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United Kingdom is identical; (3) As the plaint in the present suit sets forth that the defendants had by themselves or their predecessors-in-title been in adverse possession of the properties since 1895 at least, he can only recover them by the strength of his own title [see *Prahlad Sen* v. *Maharajah Rajendra Kishore Singh*, (1869) 12 Moo I A 334; *Mahomed Ibrahim* v. *Morrison*, (1878) 5 C 36; and *Doe* v. *Nepean*, (1833) 5 B & Ad 94], and by proving facts which take his case out of the operation of Art. 144 to Sch. I of the Limitation Act. The evidence in both the former and the present suits relative to the death or disappearance of *B* did not establish such facts.

Four consolidated appeals from decrees of the High Court (Das and Bucknill, JJ.), dated the 12th April, 1922, reversing the decrees of the Subordinate Judge (D. Prasad, Esq.) of Muzafferpur, dated the 12th September, 1918, and decreeing the respondent's claims for possession of the properties specified in his plaints, with mesne profits.

The facts appear from the report of the prior proceedings in *Mahant Ramrup* v. *Lal Chand Marwari* (1) and from their Lordships' judgment.

*L. de Gruyther, K. C.* and *E. B. Raikes* for appellants:—The suits were barred under either Art. 134 or Art. 144 of Sch. I to the Limitation Act [*Vidya Varuthi* v. *Balusami* (2) and *Damodar Das* v. *Lakhan Das* (3)] and the possession of the purchasers became adverse to the respondent from the date of their respective purchases. The High Court erred in holding that Art. 144 did not apply because the title in the properties in question was in the Mahant, and they should have held on the respondent's pleadings and evidence that the Mahant was only a manager for the juridical owner, the deity or Math. If the title was in the Mahant, Art. 134 applied. Further, if the possession of the purchasers only became adverse on the death of *B*, the vendor-Mahant, they should have held that such death occurred as soon as the respondent could claim the benefit of the presumption in S. 108 of the Evidence Act.

*A. M. Dunne, K. C.* and *W. Wallach* for respondents:—The decision of the High Court that the suits were not barred by limitation was correct, and that of the Subordinate Judge was erroneous, for the title to the properties was in the Mahant and so long as the vendor-Mahant was alive, there could be no adverse possession. Also the findings of both the Courts in India on issues other than the issues as limitation were correct, and could not be disturbed.

1. (1922) I L R 1 Pat 475. 2. (1921) 48 I A 302: 41 M L J 346 (P C). 3. (1910) 37 I A 147 : 20 M L J 624 (P C).

5th December, 1925. The Judgment of the Board was delivered by

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*v.*
Ramrup Gir.

Lord Blanesburgh.

LORD BLANESBURGH.—These are consolidated appeals by the defendants in four out of eight suits instituted by one Ramrup Gir in the Court of the First Sub-Judge at Muzafferpur on the 30th November, 1916. The suits were brought on the allegation that the plaintiff, as the then Mahant of an asthal or math at Paprikhan Karan, was entitled to recover from the defendants different properties, endowments of the math, then in their possession. These properties had, it was alleged, been alienated without warrant by Bhawan Gir, deceased, the immediate predecessor as Mahant of the plaintiff. The suits, as they progressed, were amended by the joinder as co-plaintiffs of three persons to whom in consideration of their supplying funds for the conduct of the litigation Ramrup Gir had agreed to transfer when recovered certain portions of the properties in question. As so amended they were heard at length by the learned Subordinate Judge, and, on appeal, by the High Court at Patna, where many issues were raised and strenuously contested. Of these one only remains for determination by their Lordships, namely, the issue of limitation. The learned Trial Judge held that the suits were barred by statute. The High Court, on appeal, held that they were not, and made decrees for possession of the properties with mesne profits. It is against these decrees and on the ground that the suits should have been dismissed as being out of time that the present appeals have been brought and argued.

The math in question has a considerable history. It is a math of the Sanyasis who are celibate and have renounced the world. The properties in suit had been amongst its endowed properties for a period of nearly 150 years. They stood in the name of the Mahant for the time being, but he had no right to alienate them otherwise than for necessity. The income from them at one time, at all events, amounted to Rs. 4000 a year, appropriated not to a single deity, but for Puja of Siuji, the principal deity, for the Pujas of the other established deities of the math and in the entertainment of mendicants and ascetics. These matters, all in dispute in the Courts below, were not again raised in contest before the Board, and may now be taken to be accepted.

In the year 1880 or shortly afterwards Bhawan Gir became Mahant of this asthal or math. He had, as his elder Chela, the plaintiff, Ramrup Gir, and, as his younger Chela, one Harihar Gir. Bhawan Gir was drunken, immoral and

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dissolute, and, as might be expected of such a person, profligate and extravagant. Portions of the endowed properties he mortgaged without justification by way of security for loans made to himself. Other portions equally without justification he purported to sell outright. The proceeds in every case were, it can hardly be doubted, spent mainly, if not entirely, upon himself. The properties mortgaged have since been sold under decrees made in suits brought to enforce the securities. And so it has come about that those properties now in dispute have all of them been in the exclusive possession of the defendants or their predecessors-in-title as for absolute interests for periods exceeding on the 30th November, 1916, in every instance a term of 26 years of continuous duration.

By 1888 Bhawan Gir had denuded himself and the math of all its endowed properties. In March, 1892, he made the asthal over to the plaintiff, and, as the plaintiff recites in a deed of sale of the 15th June, 1917, left the place for good. And he has never returned. He went on pilgrimage and Harihar Gir went with him. Some weeks later Harihar Gir came back alone and reported to the plaintiff that Bhawan Gir had died in his arms at Hardwar on the 27th April, 1892.

The plaintiff accepted that statement. It was, of course, then greatly to his interest to do so. He had become mahant if it were true. It is, however, contrary to his interest now to accept it. Indeed, if the fact be as stated it is fatal to his present claims. Yet in his evidence in these suits—to his credit be it said—he has again declared his belief that Harihar Gir's statement as to Bhawan Gir's death at Hardwar in April, 1892, is in accordance with fact. And his actions since the date of Harihar Gir's return, if they be honest, have been consistent, and consistent only with a constant belief that Bhawan Gir was dead. Almost at once he performed his Bhandara and Shadh, and he was himself instituted as mahant of the math and got Chudder and Pagree and was installed in the Gaddi. Three years later, that is to say on the 16th April, 1895, with money found by others on terms analogous to those on which the funds for the present litigation have been obtained, he instituted a series of suits against the present defendants or their then predecessors-in-title to recover the properties on the allegation that he had on the death of Bhawan Gir succeeded thereto as mahant. In those suits the plaintiff gave evidence to the effect just stated. Harihar Gir, too, was called as a witness, and he directly deposed to

Bhawan Gir's death in his presence on the date already given. His statements at that date were of course highly interested. Moreover, it was essential to the plaintiff's case then that they should be true. The learned Trial Judge, however, disbelieved them, accepting as preferable, and perhaps as true, a body of evidence adduced by the then defendants—suspicious only because of its volume and circumstance—that Bhawan Gir was alive after April, 1892: that indeed he had been seen alive in 1895 after action brought. For the reason therefore that the plaintiff had failed to establish the fact essential to the validity of his claim, namely, that Bhawan Gir was dead when the suits were instituted, the Trial Judge by decrees, dated the 27th January, 1896, dismissed them all with costs. The plaintiff appealed to the High Court, but the learned Judges of that Court, finding themselves unable on the materials before them to review the Trial Judge's finding on this issue of fact, by orders, dated the 30th November, 1897, dismissed the appeals. And so that litigation ended. Attention must be given to this last date. It will be found that the plaintiff sets great store by it in these proceedings.

The plaintiff in 1905 again performed the Bhandara of Bhawan Gir and was again installed in the Gaddi, although in his own view, as he stated in evidence in these suits that ceremony was neither essential to his institution nor redundant in its repetition. On the 30th November, 1916, he instituted the present litigation. The date is significant. Required by O. 7, R. 1 (*e*) of the First Schedule to the Code to set forth in his plaint the facts constituting his cause of action, and when it arose, the plaintiff in each of the plaints alleges that the Judges of the High Court in the earlier proceedings had, on the 30th November, 1897, accepted the then defendant's statement that the plaintiff's Guru, Mahant Bhawan Gir, was then alive: that no particulars regarding him had been known for seven years from the date of that judgment, and that it was necessary for the plaintiff to accept the 30th November, 1904, as the date of death of his Guru when the cause of action accrued to him. His suits were in time—such is the implication of the allegation, and such is his way of establishing it—in that they were commenced within twelve years to a day from the 30th November, 1904.

This view is undoubtedly mistaken. It would be fatal to the plaintiff if it were not. For his case on his chosen foundation fails upon the facts. It is not correct to say

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that the High Court in the earlier litigation found that Bhawan Gir was alive on the 30th November, 1897. What that Court did find, affirming the Subordinate Judge, was that he had not been proved to be dead on the 16th April, 1895. The latest date at which any one deposed to his being alive was a later date in the same year. And there is no evidence, either in that litigation—if it may be regarded—or in this that he has ever since been heard of. So far indeed as the present suits are concerned the only testimony adduced, apart from that of Harihar Gir, is that he has been neither seen nor heard of since he left the math in March, 1892. Putting the case therefore at its highest for the plaintiff—that is excluding altogether from consideration both Harihar Gir's direct evidence of death and the plaintiff's belief in its truth—the position is that Bhawan Gir has not been seen or heard of since the year 1895. If so, on the principle set up by the plaintiff, he must be presumed to be dead by the end of 1902. Accordingly these suits commenced only in 1916 are clearly statute barred as against the defendants.

But the law really is that on the facts now assumed there is no presumption as to Bhawan Gir being dead either in 1902 or 1904. There is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof. And their Lordships would here observe that it strikes them as not a little remarkable that the theory on this point, on which the plaintiff's pleader hazards his whole case, is still so widely held, although it has so often been shown to be mistaken. The learned Judges of the High Court have in these suits pointed out the plaintiff's error. Yet, in another part of their judgment, if their Lordships are not mistaken, they have themselves unconsciously fallen into it. They have made a decree in the plaintiff's favour because they had, as they thought, no reliable evidence as to the date of Bhawan Gir's death, and because in their judgment it was for the defendants to prove that date if they relied on it. Yet at the same time they have acceded to the plaintiff's claim for mesne profits which, at all events as claimed, are those profits accruing three years prior to the institution of the suits. This imports that Bhawan Gir was dead at that date. But if he was, then the same evidence showed that he had died many years before. The evidence, indeed, if regarded at all, required the Court not to allow mesne profits but to dismiss the suits altogether.

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Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England [*Rango Balaji* v. *Mudiyeppa* (4)], and, searching for an explanation of this very persistent heresy their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts* (5) run as follows:—

"If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

Following these words, it is constantly assumed—not perhaps unnaturally—that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This of course is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years."

To resume, however. It is manifest that the attempt made by the plaintiff in his plaint to comply with O. 7, R. 1 (*e*) and set forth the date when his cause of action arose has failed him on the facts. The result is to disclose, so far as he is concerned, a very serious position. It is made plain by the plaint that as against him the defendants had at the institution of the suits been by themselves and their predecessors in adverse possession of the properties in qeustion for more than 12 years—in point of fact since 1895 at least when the earlier litigation against them was commenced by the plaintiff, and which is the last year in which any one proposes that Bhawan Gir was seen alive. The plaint itself accordingly discloses a state of things to which S. 144 of the Limitation Act is applicable. In such circumstances it may well be that it is the obligation of the plaintiff by the law of India as it is by the law of England to satisfy the Court that his action is not barred by lapse of time. See as to India *Rajah Sahib Prahlad Sen* v.

4. (1898) I L R 23 B 296. 5. (1869) 5 Ch 139.

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*Maharajah Rajendra Kishore Singh* (6); *Mahomed Ibrahim* v. *Morrison* (7); as to England:—"There is no doubt," said the Court of Queen's Bench in *Doe* v. *Nepean* (8) "that the lessor of the plaintiff must recover by the strength of his own title and in order to do so must prove that he had a right to enter on the lands sought to be recovered within twenty years before ejection brought."

To all of which may be added the comment by Lord Justice Giffard on *Doe* v. *Nepean* (8) that the onus of proving death of any person at any particular period must rest with the person to whose title that fact is essential. *In re Phene's Trusts* (5).

On this footing therefore the plaintiff here would fail in the absence of evidence of the death of Bhawan Gir within twelve years before the institution of the suits.

But it is unnecessary in the state of the evidence in this case to proceed upon any such strict view of the plaintiff's position. He has himself, and in these suits, supplied affirmative evidence, which their Lordships cannot disregard. Harihar Gir was called as a witness on his behalf. In his evidence in chief he solemnly deposed that Bhawan Gir died in his presence at Hardwar in April, 1892. In cross-examination he added that he himself performed his funeral ceremonies, and that if anybody said that he did not die in April, 1892, it would be false. And by way of confirmation the plaintiff stated in his evidence, as their Lordships have already observed, that he himself believed that Harihar Gir was telling the truth in this matter, while, as has also been shown, his own actions and claims ever since have alone been consistent with that belief.

To their Lordships it seems impossible that such evidence adduced by the plaintiff himself, fatal as it is to his case, can be ignored. They are not blind to the difficulty. They do not forget the wealth of circumstantial evidence to the effect that Bhawan Gir was alive as late as 1895 adduced by the defendants or their predecessors-in-title in the earlier litigation, and then accepted and acted upon by the Trial Judge to the plaintiff's undoing. They do not forget that at that time such evidence was vital to the defence, nor do they fail to note the absence now of any counterpart to it when the lapse of time has made it to the highest interest of the defendants to

5. (1869) 5 Ch 139 at 151-2.
6. (1869) 12 M I A 334, 337.
7. (1878) I L R 5 C 36.
8. (1833) 5 B & Ad 94.

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accept the plaintiff's story that Bhawan Gir has been dead all these years. Their Lordships bear all this in mind, and see no occasion to commend these highly sophisticated tactics of the defendants. But they find it impossible to ignore the consistent attitude of the plaintiff, supported now by uncontradicted direct evidence of death and a wealth of concurring testimony to the effect that since Bhawan Gir abandoned the math in 1892 with Harihar Gir he has not been seen or heard of. If these suits were being brought against defendants neither parties nor privies to the earlier litigation there could, in their Lordships' view, have been no question that the evidence now adduced on behalf of the plaintiff would have been completely destructive of his case. Is the position of the defendants so compromised by their attitude in the earlier litigation that they are in effect estopped from deriving benefit from the plaintiff's evidence of death even if it now by reason of the lapse of time has gained so greatly in force? It is of course hard upon the plaintiff that evidence rejected in 1895, when it would have helped him, should now be accepted when it hurts him. On the other hand, it must be remembered that the complete disappearance down to the present time of Bhawan Gir and the now disinterested character of the evidence adds to the plaintiff's story of his death a strength from external circumstances altogether lacking in 1895. Moreover, to ignore the evidence altogether would be to fly in the face of the statute.

The difficulty of the plaintiff's present position in this matter was not, it would seem, at all appreciated in the Courts below. Das, J. in the High Court, for instance, proceeded upon the footing that his evidence on this point was adduced only in the earlier proceedings, and the learned Judge disposed of the point:—

"It is quite true that it was the plaintiff's case in the suit which he instituted in 1895 that Bhawan Gir died on the 15th Baisak, 1299, but that case was not accepted by the Courts."

That is all. To the evidence in the present suit the learned Judge makes no allusion. It is that evidence which their Lordships find themselves unable to ignore. The plaintiff must, as it seems to them, take the consequences of solemn testimony given by himself and adduced on his behalf.

This disposes of the case, and it is unnecessary for their Lordships to deal with the important and difficult question whether here the statute did not commence to run in favour of the defendants from the dates of the wrongful alienations

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of the properties or at all events from the date of his final abandonment of his office by Bhawan Gir and not only from his death. Whether, in other words, the case is governed by the decisions of which *Damodar Das* v. *Lakhan Das* (3) may be taken as the leading authority: or by the line of authority of which *Vidya Varuthi Thirtha* v. *Balusami Aiyar* (2) may be taken as typical. Their Lordships while not pronouncing upon it have given very careful consideration to this interesting and difficult question. Upon it they say no more than this, that they must not be taken to accept the view with reference to it propounded by the High Court. So far as they are concerned the question remains entirely open to be determined when it arises.

For the reasons above given, however, they are of opinion that the decree of the High Court should be recalled and that of the Trial Judge restored, and they will humbly advise His Majesty accordingly. The respondents must pay to the appellants their costs before the Board and in the High Court.

Solicitors for appellants: *Watkins and Hunter.*

Solicitor for respondents: *H. S. L. Polak.*

A. de M. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Guduthuru Thimmappa ... *Appellant** (*Plaintiff*)

*v.*

V. Balakrishna Mudaliar and another ... *Respondents* (*Defendants*).

Guduthuru Thimmappa *v.* Balakrishna Mudaliar.

*Civil Procedure Code, S. 20—Partnership—Suit for dissolution—Jurisdiction of Court—Business carried on at two places—Accounts kept at one place—Issue as to jurisdiction—Practice—Trial as preliminary issue.*

Where a partnership business is carried on at two places, the cause of action for a suit for dissolution arises in both the places and the Courts in either of them have jurisdiction to entertain the suit. The Court within whose limits the partnership accounts were being maintained has jurisdiction to try such a suit.

An issue as to the jurisdiction of the trying Court in such a suit ought to be tried as a preliminary issue at the earliest opportunity.

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*A A O No. 166 of 1923. 5th October, 1925.

2. (1921) 48 I A 302: 41 M L J 346 (P C).

3. (1910) 37 I A 147 : 20 M L J 624 (P C).

Guduthuru Thimmappa *v.* Balakrishna Mudaliar.

Appeal against the order of the Court of the Subordinate Judge of Bellary, dated 7th March, 1923, in O. S. No. 16 of 1921.

*A. Viswanatha Aiyar* for appellant.

*M. Subbaroya Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The question in this appeal is whether the Subordinate Judge's Court at Bellary had jurisdiction to try the suit. The suit was filed so far back as 5th March, 1921, and the Subordinate Judge decided that the Court had no jurisdiction on the 7th March, 1923. The defendants raised the question of jurisdiction in issue 15. A preliminary issue like this should have been disposed of at the earliest opportunity. The learned Subordinate Judge did not do that, but after a number of witnesses were examined on commission and after the defendant took time to adduce evidence he decided this question in favour of the defendant.

The suit is for dissolution of partnership. The plaintiff, who is a resident of Bellary, entered into partnership with the defendant, a resident of Coimbatore, for the purchase and sale of cotton. Under the arrangement they were to share the profits. It is unnecessary to consider what shares the plaintiff and defendant had in the partnership as it is a matter which has to be determined in a suit. The defendant admits that partnership arrangement was entered into and that the plaintiff and he were partners. But his contention is that the partnership business was carried on only in Coimbatore and not in Bellary and therefore the Court at Bellary had no jurisdiction. Under the arrangement the plaintiff was to purchase cotton not only at Bellary but in other places, but the sale of the cotton was to be effected at Coimbatore where cotton mills are situate. The accounts of the business were maintained at Bellary as alleged in paragraph 20 of the written statement. The defendant, though he denied that the accounts were maintained in Bellary, did not choose to say where the partnership accounts were maintained. His vakil now says no accounts were necessary as it was arranged that the profits of each consignment should be settled at once. This is a very strange arrangement of settling accounts of a partnership in which very large consignments of cotton were made. Inasmuch as the defendant chooses to say that no accounts were kept by him at Coimbatore in connection with the partnership it cannot be said that the partnership was

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carried on only at Coimbatore. The learned Subordinate Judge has evidently made a mistake in holding that the substantial portion of the business should be carried on at Bellary in order to give jurisdiction to the Bellary Court. Where partnership business is carried on at two places, the cause of action arises in both the places and the Courts have jurisdiction to entertain the suit for dissolution of partnership in either of these places. In this case both the Coimbatore as well as the Bellary Courts have jurisdiction to entertain the suit. This suit was filed in Bellary Court. That Court had jurisdiction to try the case. In *Bavah Meah Saib* v. *Khajele Meah Saib* (1) Bittleston, J. observes:

"As regards a suit of this nature, when it appears that the partnership business is carried on substantially in two or more places, I think that the cause of action does partly arise in each of those places within the meaning of S. 12 of our Charter."

Their Lordships of the Privy Council attach importance in connection with the carrying on of the business to the fact that the partnership accounts are kept at a particular place. In *Luchmee Chand* v. *Zoreswar Mull* (2) their Lordships observe:

"Where can it be said that the cause of action, supposing it exists for that balance, properly arose? Muttra was, undoubtedly, the central place of business; at Muttra the partnership books were kept; at Muttra the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them, and if, in the result, a balance was due to the appellants, Muttra would be the place where the payment of that balance would have to be made. It therefore appears clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership transactions, that cause of action arose at Muttra."

Here as already observed the books of the partnership were maintained by the plaintiff at Bellary. Therefore the cause of action for a suit of this kind did arise within the jurisdiction of the Bellary Court. The Subordinate Judge has entirely gone out of his way in considering whether the accounts have been satisfactorily kept or not. That is a matter which will have to be dealt with when the suit is tried on the merits.

In the result we set aside the decree of the Subordinate Judge and direct him to restore the suit to file and proceed with it according to law. The respondent will pay the costs of this appeal.

T. S. V. *Decree set aside and suit remanded.*

1. (1869) 4 M H C R 218 at 222. 2. (1860) 8 M I A 291 at 307.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

P. S. Kesavalu Naicker ... *Appellant** (*Defendant*)

*v.*

The Corporation of Madras ... *Respondent* (*Plaintiff*).

Kesavalu Naicker *v.* Corporation of Madras.

*Madras City Tenants Protection Act (III of 1922), S. 2, cl. (4)—Tenant—Licensee—Distinction—Evidence—Madras City Municipal Act (IV of 1919), S. 226—Applicability—Permits under—Issue of—Effect on nature of tenant's possession—City Tenants Protection Act—Preamble—Tenant who has constructed building in hope of not being evicted—Inference of, when justified—S. 3 of Act—Compensation for building on eviction—Measure of—Act—Interpretation—Preamble if and when controls sections—Discussions prior to passing of Act—Reference to—Permissibility—Public streets—Soil in—Corporation's right in—Lease by Corporation thereof—Validity under new Municipal Act—Lease by Corporation—Validity—Right of Corporation to dispute—Estoppel.*

S. 226 of the City Municipal Act IV of 1919 deals with temporary obstructions, which would be an offence unless permission is granted for making them. It has nothing whatever to do with giving licences for keeping an ice depot.

In a case in which the defendant and his predecessor were found to have been tenants of the Corporation for over 40 years, *held*, that the mere fact that the Corporation issued permits to the defendant a few years before suit under S. 226 (1) of the Act and that they were not refused by him could not convert the tenancy into a holding by mere license. To have that effect the Corporation must go further and shew that the defendant agreed to be a mere licensee.

The Preamble of an Act may be referred to in a case of ambiguity or where it is necessary to interpret the Act so as to give effect to its purport, but it is doubtful whether the meaning of definite and unambiguous words can be strained because their natural interpretation would seem to extend the alleged scope of the Act.

When a man has spent a considerable sum of money in erecting a pucca masonry building on another's land there is a legitimate inference to be drawn that he did so in the hope that he would not be evicted within the Preamble of the City Tenants Protection Act III of 1922, an inference which may be rebutted by other circumstances, which show that he could not have had such a hope.

The provisions of an enactment ought to be looked to to ascertain its scope rather than the intention of the legislature as revealed in the discussion which preceded the passing of the Act.

On eviction the tenant is entitled, as compensation for his building, not to rental value, but only to the value of the building.

The Corporation having, though not the full ownership of, still a certain proprietary right in the soil in, public streets, it can, even under the new Municipal Act, grant a lease to the extent of that right.

Where it did so grant a lease in 1919, *held*, that it could not afterwards contend that the lease actually granted by it was void as being prohibited by law.

*C C C Appeal No. 22 of 1924. 9th October, 1925.

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*Held*, on the evidence in the case, that the defendant was a "tenant" within the City Tenants Protection Act, and not a mere licensee.

On Appeal from the decree of the City Civil Court, Madras, in O. S. No. 68 of 1923.

*K. Duraiswami Aiyangar* for appellant.

*S. Rangaswami Aiyangar* for respondent.

The Court delivered the following

JUDGMENT:—In this case the facts are as follows:—The defendant's uncle, Muthuswami Naicker, put up the building in suit 48 years ago, on the roadside land in the Pantheon Road, for the purpose of selling ærated waters and ice. The building is a pucca masonry one and the plaintiff, Corporation of Madras, now wishes to eject the defendant, to whom the property was given by his uncle about 1908. The defendant obtained lease deeds for this property in 1908, 1911 and 1914 for a period of 3 years each. At the end of the last lease, the Corporation proposed to sell the right to occupy the building and site at auction and notice was issued on 18th April, 1917 (Ex. IV). The defendant protested against this by a lawyer's notice (Ex. II) and put in a petition (Ex. III) on 30th April, 1917. As a result of this, a fresh lease for one year was granted to the defendant and this was renewed for a second year in 1918 for the year 1918-1919. When the new Municipal Act was passed, the Corporation seems to have thought that it could not grant a lease of the suit property and they proposed to auction the property and grant a license. On 21st February, 1919, the date of the auction, no bidders turned up. On 24th February, 1919 the defendant went to the Revenue Officer and agreed to pay a rent of Rs. 3-8-0 per mensem in respect of the suit land, and on 14th July, 1919 the Corporation granted him the lease Ex. E-1. On 17th March, 1920 a notice was issued by the Corporation, that the right of putting up a bunk on the suit site would be sold by auction. But as a matter of fact no auction appears to have taken place, and on 9th October, 1920 the Corporation issued Ex. F, which purports to be a permit under S. 226 (1), Act IV of 1919. Under this the defendant was permitted to occupy the suit site for the purpose of keeping an ice depot for one year. A similar permit was issued on 4th August, 1921 for the year ending 31st March, 1922. On 2nd March, 1922, the Corporation again proposed to auction the site and then finally on 11th November, 1922 the Corporation gave a notice to the defendant to quit. The defendant replied stat-

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ing that he had held the land for a very long period and that he was entitled to compensation under the City Tenants Protection Act.

The main question for consideration here is, whether the defendant is a tenant within the meaning of the Madras City Tenants Protection Act. The learned City Civil Judge has found that he was not a tenant but merely a licensee. We see that up to 31st March, 1920 the defendant had been obtaining leases from the Corporation for the use of the site and was undoubtedly up to that time a tenant. It is suggested that for the year 1920 the Corporation had no power to grant a lease of the suit land as it comes within the definition of public street contained in the Act. Such public streets are vested in the Corporation and although the Corporation has not the full ownership in them yet they have a certain proprietary right in the soil, and this has been recognised in *S. Sundaram Aiyar* v. *The Municipal Council of Madura and the Secretary of State for India in Council* (1) in which it was held that the Corporation had a certain proprietary right in the soil of public streets. Under the new Municipal Act of 1919, the Corporation is authorised to lease any Corporation immoveable property and if the Corporation has a proprietary right in public streets to the extent of that right it can grant a lease, and even, if it had no right to grant a lease, I do not think the Corporation can now contend that the lease actually granted by them in 1919 was void as being prohibited by law. Until March, 1920, therefore, the defendant was a tenant But it is contended for the respondents that by the mere fact of his accepting Exs. F and G, the permits under S. 226 (1) he became a mere licensee. When we turn to S. 226 (1) we find that it deals with persons making holes and causing obstruction in the street, and provides that persons are forbidden to make holes or cause any obstruction in any street unless the consent of the Commissioner is obtained. Cl. 2 prescribes that, when such permission is granted, such persons shall cause such holes or obstruction to be sufficiently fenced, and enclosed and shall cause such hole or obstruction to be sufficiently lighted during the night. It is not suggested that the plaintiff's building was in any sense an obstruction to the street and the idea of allowing him to occupy it for the purpose of keeping an ice depot from year to year has no connection with the provisions of S. 226. S. 226 deals with the temporary obstruc-

1. (1901) I.L.R. 25 M. 635: 12 M.L.J. 37.

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tions, which would be an offence unless permission is granted for making them. It has nothing whatever to do with giving licenses for keeping an ice depot. The defendant never even expressed his consent to be a licensee. He and his predecessor had been tenants of the Corporation for over 40 years and the mere fact that these extraordinary permits were issued to him and were not refused, cannot convert that tenancy into a holding by mere license. In the absence of evidence that the defendant agreed to be a mere licensee, I think that the mere issue of licenses would not be sufficient material to raise a presumption of a change in the nature of his possession, which had for many years been that of a tenant. The present case, where the license is obviously a license which the Corporation has no power to issue in such form and in the circumstances that existed, is much stronger and the defendant must be deemed to have been holding on as a tenant after expiry of his last lease. Even on 10th April, 1920 he was treated by the Tahsildar as a tenant of the Corporation. No attempt was made to disturb his possession and his possession has all along been of the same nature. Whenever any change was proposed to be made, the defendant has protested and no change has actually been made in the nature of his possession. The question then arises whether the defendant is a tenant within the meaning of S. 2, cl. 4 of Act III of 1922. That clause reads as follows:—

"'Tenant' means tenant of land liable to pay rent on it, every other person deriving title from him and includes persons who continue in possession after the termination of the tenancy."

The defendant certainly would seem to come within the definition. It is, however, argued that in order to understand this definition, which is not in itself ambiguous, one must refer to the Preamble of the Act which says:

"Whereas it is necessary to give protection to tenants who have constructed buildings on other's lands in the hope that they would not be evicted so long as they pay a fair rent."

The rule of construction is that the Preamble of the Act may be referred to in a case of ambiguity or where it is necessary to interpret the Act itself so as to give effect to its purport, but it is doubtful whether the meaning of definite and unambiguous words can be strained because their natural interpretation would seem to extend the alleged scope of the Act. In any case I do not think, that in the present instance it can be said that the Act does not refer to persons in the position of the defendant. Nor am I satisfied that defendant's posi-

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tion is not that contemplated by the preamble. It is difficult now to adduce evidence that the person who constructed the suit building 48 years ago did so in the hope that he would not be evicted. The oral evidence of the actual builder to that effect would not be of much value when given for the purpose of such a suit as this, but I think, that, when a man has spent a considerable sum of money in erecting a pucca masonry building on another's land there is a legitimate inference to be drawn, that he did so in the hope that he would not be evicted, an inference, which may be rebutted by other circumstances, which show that he could not have had such a hope. In the present case there is something rather more than a mere inference, for, as the learned Judge points out, "the defendant's predecessor-in-title apparently ventured upon a brick-built structure, in view of the favour that he then enjoyed from very high officials who got ice from him." If he enjoyed the favour of high officials (possibly officials in the employ of the plaintiff Corporation) it is difficult to suppose, that he spent his money without hoping that he would be allowed to reap the benefit of the expenditure. In that view the defendant would come within the meaning of the Act. It is urged that if the provisions of the Act are applied literally, the scope of the Act would be very materially widened beyond that expressed in the preamble. This may be so, but when the legislature passes an enactment, its provisions must be looked to rather than the intention of the legislature, as revealed in the discussion which preceded the passing of the Act. Construing the Act as it stands, I must hold that the defendant is a tenant within the meaning of the Act and consequently under S. 3, is entitled on ejectment to be paid compensation for his building. He did make an application under S. 9 but that is not pressed. This is intelligible when we remember that the plaintiff Corporation is not the absolute owner of the plaint site and consequently what the defendant could purchase under S. 9 is only the limited interest of his landlord. The suit will have to be remitted to the Lower Court for investigation as to the value of defendant's superstructure and when, that has been determined, the decree will have to be modified by awarding that amount to the defendant as compensation. A finding as to the amount of compensation payable to be submitted within 3 weeks. Objections 7 days. The defendant will have his costs of this appeal and the costs of the Lower Court will be provided for in the revised decree.

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In compliance of the above order the City Civil Judge, Madras, submitted the following

FINDING:—This suit has been remanded for an enquiry as to the amount of compensation payable to the defendant in respect of the superstructure on the plaint site. As this required local inspection and investigation, the taking of measurements and finding out of values, I remitted the question with the consent of parties to a Commissioner who has a great deal of experience in such matters, being the person most often entrusted with ascertainment of values in dispute between parties. He has submitted a report with full particulars as to measurements and values. He assesses the present value of the superstructure at Rs. 468-15-0.

2. Both parties have filed objections. The defendant's principal objection or at any rate the point argued before me was that the ground rent charged by the Municipality for the suit superstructure is Rs. 3-8-0, that the building itself will fetch a rent at least of Rs. 8 and that if the said sum is capitalised his client would be entitled at least to Rs. 900. This method of arriving at value has been found by experience to be extremely unsafe in a City like Madras. It is within my experience that a space of land 8 ft. by 3 ft. on which a bunk is put up at an expenditure of say Rs. 50, fetches a rent of Rs. 8 or Rs. 10 per mensem. If the said sum was capitalised in the manner suggested by the defendant, the valuation of the structure would run up to Rs. 700 or Rs. 800. The rent charged in respect of a site depends upon its eligibility as a trade site and its suitability for the particular trade sought to be carried on, and has no reference in most cases to the actual value of either the land or the superstructure erected thereon. The method adopted by the Commissioner of finding out the different kinds of materials employed in the building and then assessing them at their present value seems to me to be the most fair one as between the parties.

3. The plaintiff's main objection was that the defendant's building is a very old one, that it is not plumb or straight from top to bottom, that it had numerous cracks which had been recently concealed by colour-washing and that the Commissioner has not made any allowance for these defects. He further says that the Municipal Engineer has valued the building only at Rs. 200. I am not able to pay any serious attention to the valuation of the

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Municipal Engineer, which is moreover not on record, as the said Engineer has not been submitted to cross-examination and after all the valuation can only be regarded as one suggested by one of the parties to the suit. I find that the Commissioner has not suggested rates for a new building but expressly admitted that it is an old building recently furnished up and makes allowance for its age and wear and tear. I submit a report to the effect that the structure put up by the defendant on public Municipal land is worth Rs. 468-15-0 and that he is entitled to compensation at that rate before he is evicted by the plaintiff. I may also add that the defendant took some time in order to ascertain whether the Commissioner of the Corporation would allow him to continue as tenant on Municipal land on the same terms as those on which he has been a tenant till recently. Apparently there was an agreement as to the terms but as plaintiff wanted the entire cost of the suit negotiations appear to have fallen through. I mention this as this incident is responsible for the delay in submitting this report.

The appeal coming on for final hearing after the return of the finding of the Lower Court upon the issue referred by this Court for trial,

The Court delivered the following

JUDGMENT:—The petitioner is not entitled to rental value but only to the value of the building. The finding that it is worth Rs. 468-15-0 is therefore accepted and plaintiff will have a decree for possession of the land and superstructure on payment of this amount less the annual rental due by defendant up to date of delivering possession. Each side will bear his own costs in the Lower Court. The time for delivery is one month.

A. S. V. *Decree modified.*

## [FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE PHILLIPS AND MR. JUSTICE KUMARASWAMI SASTRI.

Katreddi Ramiah and another ... *Appellants** (*Defendants* 2 *and* 15)

*v.*

Kadiyala Venkata Subbamma and others ... *Respondents* (*Plaintiffs and defendants* 1, 3 *to* 14 *and* 16).

F. B. Katreddi Ramiah *v.* Kadiyala Venkata Subbamma.

*Hindu Wills Act—Will executed by Hindu in the moffussil—Estate when vests in executor—Probate not obtained—Effect of.*

In the case of a Hindu will executed in the moffussil to which the Hindu Wills Act does not apply, the estate vests in the executor (who accepts office) from the date of the testator's death and the provisions of the Probate and Administration Act are applicable even though probate has not been obtained. Case-law discussed.

Appeal against the decree of the Court of the Additional Subordinate Judge of Ellore in O. S. No. 35 of 1920 (O. S. No. 100 of 1919 on the file of the Sub-Court, Ellore).

*A. Krishnaswami Aiyar* for appellants.

*Advocate-General* for 16th respondent, *G. Lakshmanna* and *V. Suryanarayana* for respondents 1 and 2, *A. Satyanarayana* and *P. Bapiraju* for 3rd respondent and *Ch. Raghava Rao for* 7th respondent.

The Court (Spencer and Srinivasa Aiyangar, JJ.)† made the following

Spencer, J.

ORDER OF REFERENCE TO A FULL BENCH:—*Spencer, J.*:— M. Subbanna executed a will on 22nd September, 1914, and died more than two years afterwards on 5th January, 1917, leaving no sons but a daughter, a daughter's son and a widow. He appointed his wife executrix of his will authorizing her to pay his debts out of the proceeds of 1,000 bags of paddy that he had in store in 1914, to recover sums owed to him by others, to sell a certain house and site, to carry out certain charitable and religious dispositions, to adopt a son and to manage the adopted son's one-third share of immoveable property till he attained majority, etc., and then follows a general clause: "I authorize my wife to conduct all the remaining affairs in my stead." Respondent's vakil attempted to argue

*Appeal No. 70 of 1921. 31st March, 1925.

†13th November, 1924.

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that 1st defendant was only an executrix for a limited purpose (*cf.* S. 35 of Probate and Administration Act), and that the intention of the testator was to empower her to transact only those affairs which he specifically mentioned in the will. The use of the Telegu words యావత్తు (*yavattu*) and తతిమ్మ (*tatimma*) in this passage is to my mind consistent only with one meaning and that is that the testator intended his wife to be his general executrix. He provided in his will that his entire immoveable property (excluding certain purchases of land which he had dedicated to temple worship) should be divided into three shares, and one share given to his daughter's son (2nd plaintiff), one to his adopted son (16th defendant), and one to his widow (1st defendant) for life, and that after her death her share should be divided between his daughter's son and the son adopted by his widow. The genuineness of the will is not disputed. Owing to the lapse of time between the making of the will and the testator's death, and the expense of law suits which he engaged in during his life, the paddy mentioned in the will as a fund for discharging debts was not available to the executrix, and she consequently had to sell 23 acres 68 cents of wet land under Ex. I to the 2nd defendant for the purpose of paying certain promissory notes and decree debts left owing by her husband when he died in 1917, and she further entered into a mortgage in favour of the 15th defendant for a similar purpose during the pendency of the present suit, which was instituted by deceased's daughter and daughter's son to obtain possession of the properties allotted to them under a family settlement alleged to have been arranged 13 days after the testator's death, or in the alternative to recover their legacies under the will, unencumbered by the sale, leases and mortgages to 2nd, 3rd, 6th and 15th defendants, respectively, and mesne profits for two years. The Subordinate Judge found for the plaintiffs and accordingly granted them a preliminary decree subject to the condition of their paying to 1st defendant Rs. 1,946 as their share of the debts amounting to Rs. 5,000 for which the testator was liable at the date of his death. The purchaser and the mortgagee (defendants 2 and 15) from the widow appeal. The argument put forward on their behalf was that, as the estate vested in the executrix from the date of the testator's death by virtue of the will, she could sell or mortgage his property to pay off his debts and could give the purchaser or mortgagee a good title.

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As the will, with which we are concerned, was not executed by a Hindu within the City of Madras and does not relate to immoveable property situate within this Court's Original Side jurisdiction, the Hindu Wills Act has no application to it, and conseqently it was not made imperative by S. 187 of the Succession Act that the executrix should take out probate in order to establish her right to deal with the deceased's estate. S. 179, which speaks of vesting, does not apply to the will of a Hindu, but S. 4, which is the corresponding provision of the Probate and Administration Act, applies. S. 12 of that Act states that probate of a will, when granted, establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such, thus implying that they are not valid until probate is granted. I take this to mean that the executor of a Hindu will may do all acts which the will enjoins or permits him to do without any risk of having his authority to act *qua* executor questioned, but that if he exceeds his authority and does acts which the will does not expressly authorize him to do, such as the disposal of immoveable property requiring the permission of Court which can only be given under S. 90 (2), such acts are voidable at the instance of any person interested, unless and until the executor obtains probate or letters of administration and gets an order of Court to validate what he has done in the interval between the testator's death and the issue of probate or letters of administration. what acts an executor can under English Law do before obtaining probate are set out in Williams on Executors, Vol. I, at p. 213 to 215. They include the payment of debts owing by the deceased and the disposal of the testator's goods and chattels and real estate. An executor could always sell personalty in order to pay debts, and since 1897 he can sell, lease, or mortgage reality for that purpose (vide pages 693 to 704). His power of disposal is absolute, but as he cannot maintain an action before probate though he can be sued if he has intermeddled with the estate, it becomes necessary for probate or letters of administration (if he dies first) to be obtained in order to justify his actions as executor.

There appears to be some divergence of opinion between the Calcutta and Bombay High Courts in the view taken by them as to the position of the executor of a Hindu or Muhammadan will who does not take out probate, Mr. Justice Pugh in Calcutta regarding him as a mere manager for the purpose of paying the debts and distributing the estate [*Sakina Bibee* v.

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*Mahomed Ishak* (1)] and Mr. Justice Russell and Mr. Justice Marten in Bombay treating him as an executor in whom the estate vests by virtue of S. 4 of the Probate and Administration Act [*Narrondas Ramji* v. *Narrondas Ramji* (2)] and *Sir Mahomed Yusuf* v. *Hargovandas Jivan* (3)].

So far back as 1878 Markby, J., in *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (4) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5) held that the executor of a Hindu will did not represent the deceased by virtue of the will until he had obtained probate and the property did not vest in him by his mere appointment as executor in the will, and Maclean, C. J., in *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), expressed an opinion that the inclusion of the vesting section under the chapter relating to the grant of probate and letters of administration was an indication that the vesting followed from the grant of probate and that till then the executor held the property only as manager. There is also an observation of the Judicial Committee in *The Administrator-General of Bengal* v. *Premlal Mullick* (7), that prior to the Hindu Wills Act (the case before them being one of a will made in 1889 by a Hindu resident of Calcutta City) the powers and functions of the executor of a Hindu estate were those of a manager rather than those of an executor of an English will, that he did not require probate and that probate if obtained would not have vested him with any title to the estate, either real or personal, which he administered. The decision of the same tribunal in *Kurrutulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan* (8), which by referring to Ss. 4, 59 and 90 of the Probate and Administration Act draws a distinction between executors under the Act and other executors who fail to take out probate throws light on this debated question. The Courts of Madras, Bombay and Calcutta seem to be all agreed that the executor of a Hindu will made in the mofussil derives his title from the will and that he can perform any of the duties cast on him by the will without taking out probate [vide *Ganapathi Aiyar* v. *Sivamalai Goundan* (9); *Balakrishnudu* v. *Narayanaswamy Chetty* (10); *Rajah Parthasarathy Appa*

1. (1910) I L R 37 Cal 839 at 842. 2. (1907) I L R 31 Bom 418 at 428.
3. (1922) I L R 47 Bom 231. 4. (1878) I L R 4 Cal 342.
5. (1878) I L R 4 Cal 455 at 468. 6. (1897) I L R 25 Cal 103.
7. (1895) I L R 22 Cal 788 (P C)
8. (1905) I L R 33 Cal 116 : 15 M L J 336 (P C)
9. (1912) I L R 36 Mad 575 : 23 M L J 306.
10. (1912) I L R 37 Mad 175.

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*Rao* v. *Rajah Venkatadri Appa Rao* (11)]. Even the learned Judges who decided *Sir Mahomed Yusuf* v. *Hargovandas Jivan* (3) were agreed in thinking that an executor who did not take out probate would be subject to any restriction in the will as to the disposal of immovable property. Such a disposal as would interfere with the literal performance of the trusts imposed by the will on the executor in respect of the specific bequests of immoveable property would not be valid unless the executor obtained probate and obtained the directions of the Court under S. 90 (2). The executor of a Hindu will has not in my opinion the general powers of an executor of an English will, as there is no section in the Probate and Administration Act giving an executor the wide powers conferred by S. 269 of the Succession Act. In *Ganapathi Aiyar* v. *Sivamalai Goundan* (9), Sundara Aiyar and Sadasiva Aiyar, JJ., observed, "we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate." My learned brother, whose judgment I have had the advantage of reading, apparently thinks that this observation goes too far and that an executor of a Hindu will in the mofussil has none of the powers of an executor under the Probate and Administration Act, unless he first takes out probate. This is in effect the Calcutta view. I would not go so far as to say that an executor appointed by will who does not take out probate is not an executor within the Act, as I think that S. 90, cl. (2), recognizes the existence of two classes of executors (1) those executors who get probate and obtain orders of Court for disposing of immoveable property and (2) those executors who do not do so and are restricted to the terms of the will. The section speaks of even the former class as having the property vested in them, although probate has not been granted to them.

As the 1st defendant by disposing of 23 acres 68 cents of wet land under Ex. 1 in favour of the 2nd defendant for a price of Rs. 4,500 disabled herself from carrying out the testator's wishes in their entirety as to the division of his immoveable property among his heirs in the manner set out in the will, and as she did not either before or after the sale validate her act by taking out probate and obtaining permission of the

3. (1922) I L R 47 Bom 231 at 241.

9. (1912) I L R 36 Mad 575 : 23 M L J 306.

11. (1922) I L R 46 Mad 190 : 43 M L J 486.

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Court to dispose of the testator's immoveable property for discharging his debts, the learned Subordinate Judge was right in my opinion in declaring the sale-deed in favour of the 2nd defendant to be not valid and binding on the heirs under the will. Similarly the mortgage must also have been invalid so far as it interfered with their obtaining a distribution of their shares, but being executed *pendente lite* the plaintiffs were entitled to ignore it.

I am inclined to treat the 1st defendant as an executrix who has exceeded the limited authority given to her under the will as regards the disposal of immovable property and has failed to invest herself with the power that she might have got by taking out probate and applying to the Court to permit her to dispose of that property in a manner not authorised by the will.

Whether when the assets set apart under the will were not available for discharging the testator's debt, the 1st defendant, either as executrix without probate or as the manager or person in actual possession of the estate, would have power to sell any portion of it for the necessary purpose of discharging the deceased's debts and could give a good title to the purchaser is a question that has not been argued before us. As the determination of this question will largely depend on the answer to be given to the question of law formulated by my learned brother, I agree to the reference to a Full Bench in the terms proposed in his judgment.

Srinivasa Aiyangar, J.

*Srinivasa Aiyangar, J.*—The main question that arises in this appeal is one of considerable difficulty and at the same time of great general importance. The difficulty of the question, has been immensely increased by the wide divergence in the views, with regard to the question, of the various High Courts in this country.

The daughter and the daughter's son of one Venkatasubbanna, the testator, instituted the suit from which this appeal has arisen. The 1st defendant is the widow of the testator and the 16th defendant is the son adopted by the 1st defendant to her deceased husband, the testator, under a power given to her by his will. Defendants 2 to 15 may all be regarded as alienees claiming through the 1st defendant.

The plaintiff's claim was for having these alienations set aside and delivery over to the plaintiffs of certain lands alleged to have been agreed to be given to them under a family arrangement entered into by the 1st defendant, subsequent to

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the death of the testator, or, in the alternative, for a partition and delivery over to them of their shares in the estate of the deceased according to the terms of the will. On behalf of the contesting defendants, namely, defendants 1 to 15, it was *inter alia* pleaded that the 1st defendant was the executrix appointed by the testator and that as such she was entitled to sell and dispose of the property of the deceased testator and that therefore the alienations could not be set aside. The learned Subordinate Judge in the Court below found on a construction of the will that there was no appointment of the 1st defendant in the will as general executrix either expressly or by necessary implication. On this finding the Lower Court set aside the alienations and holding that the family arrangement set up by the plaintiffs was not proved, gave a decree in their favour for their shares of the properties bequeathed to them under the will subject, however, to a direction that the plaintiffs should pay to the 1st defendant a fifth share of the total amount of the debts of the testator discharged by the 1st defendant.

The first question, therefore, that arises is whether there is in the will an appointment of the 1st defendant as executrix by necessary implication. The learned vakil for the appellants has addressed to us a lengthy argument to show that the Lower Court was wrong in holding that there was no such appointment. It seems to me that on a perusal of the entire will and all its various clauses there can be no doubt whatever of the appointment of the 1st defendant as executrix by the necessary implication. There is no other person to whom the execution of the will is confided. Wherever the testator thought there was anything to be done by way of carrying out his intentions, he has directed that the same should be done or carried out by the 1st defendant. Thus the debts due to him are directed to be recovered by her. It is she that is authorised to obtain proper documents in respect of lands purchased by him, but the sale-deeds for which had not been obtained by him during his lifetime, and she it is also that is directed to execute deeds of gifts and other documents in respect of certain grants made by him. She is also directed to sell certain properties and utilize the sale-proceeds for the purpose of certain charities. She is also the person that is directed to get the will registered within three months of his death. Over and above all these, there is about the end of the will the following sentence : "I authorize my wife to conduct all other affairs in my stead." The other affairs refer-

red to there should necessarily signify and include affairs other than those in respect of which he has given particular directions. It is impossible to regard this sentence as not amounting to a constitution of the 1st defendant as his legal representative and the authority to conduct all other affairs undoubtedly amounts to confiding the execution of the will to her within the meaning of the definition of "executor". It almost seems to me that even apart from this sentence, the intention may be clearly gathered that she was the person to whom it was the intention of the testator that the execution of the will should be confided. But this sentence amounts almost to an express appointment. The Lower Court was, therefore, clearly wrong in coming to the conclusion that the 1st defendant was not the general executrix appointed by the will. There was no reason whatever to suppose, as the Subordinate Court seems to have done, that the 1st defendant was appointed an executrix only for certain limited purposes.

The Lower Court having arrived at the conclusion that the 1st defendant was not the executrix at all, it became unnecessary for that Court to discuss the question whether if she were executrix what her powers were as such executrix to make the alienations sought to be set aside. This leads me to the consideration of the main question in this appeal, namely, whether an executor appointed by a will made in the moffussil of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the will or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act. It was unnecessary for the learned Subordinate Judge in the Court below to consider this question because on his finding that the 1st defendant was not appointed as executrix at all, no such question arises for decision by him. As we have however found that there is an appointment of the 1st defendant as executrix if only by necessary implication, it has become necessary to determine the nature and extent of her powers over the estate of the deceased. If it should be found that even though no probate may be obtained by the executor the estate becomes vested in him from the moment of the death of the testator as indicated in S. 4 of the Probate and Administration Act and that he has all the powers of an executor as set out in that Act, then the tests to be applied for

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the purpose of determining whether or not the alienations made by him would be valid and binding would be entirely different to the tests applicable if the correct view should be that unless and until an executor obtains probate his powers are only those of a mere manager. The present appeal, it seems to me, cannot be properly determined without coming to a decision with regard to this main question. If ultimately the view should prevail that the Probate and Administration Act, is merely an enabling Act laying down the procedure for applications for probate and letters of administration and their grant and setting out the consequences that would follow on such grant being made or obtained and that therefore an executor of a will made in the moffussil, of the presidency has, till he obtains the probate, the powers only of a mere manager as though the Probate and Administration Act had not been passed, then in the view we have taken that the 1st defendant is the properly appointed executrix of the will the case will have to be remanded to the Lower Court for the purpose of determining the question what the powers are of such a mere manager with regard to the disposal of the property of the testator and whether having regard to the nature and extent of such power the particular alienations in this case were within or beyond such powers. If, however, the true view should be held to be that in the case of wills made in the moffussil the executors have, whether they obtain probate or not, all the powers of the executors as set out in the Act, then the question of the validity of the alienations might require to be determined with reference to the various sections of that Act and the provisions of the will in question. I may at once state that the case of *Ganapathi Aiyar* v. *Sivamalai Goundan* (9), is a direct authority for the position contended for by the appellants with regard to the main question of the powers of an executor under the Probate and Administration Act. The learned Judges Sundara Aiyar and Sadasiva Aiyar, JJ., say at page 578 as follows: "But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate." The reasoning on which the learned Judges proceeded to arrive at that conclusion may be summed up as follows:—(1) There is no provision in the probate and Administration Act which compels a person appointed as executor under a will to take out probate or letters of adminis-

9. (1912) I L R 36 M 575: 23 M L J 306.

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tration; whereas there is such a provision in the Indian Succession Act as incorporated in the Hindu Wills Act. (2) Under S. 4 of the Act, all the property of the deceased vests in the executor as such. (3) Neither the preamble nor the heading of Chapter II in the Act nor S. 12 requires that a different construction should be placed on S. 4. (4) Probate is not necessary to make a person an executor as his title as executor is derived under the will. (5) Probate is merely the authentic evidence of the will and not the source of the title of the executor. The learned Judges in coming to that conclusion followed the decisions of the Bombay High Court in the case of *Shaik Moosa* v. *Shaik Essa* (12) and the case of *Mathuradas Lowji* v. *Goculdas Madhowji* (13). The case of *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6) was also cited to their Lordships but has been attempted to be distinguished on a ground which I shall advert to later. It may be convenient here to observe that the view of the Bombay High Court in the said two Bombay cases has been maintained in several recent decisions of that Court. In *Narrondas Ramji* v. *Narrondas Ramji* (2) Mr. Justice Russell merely follows the earlier Bombay view citing the earlier decisions. In the case of *Sir Mahomed Yusuf* v. *Hargovandas Jivan* (3) two Judges of the Bombay High Court after considering a great deal of the case-law on the point reiterate the Bombay view and follow it. In the case of *Narrondas Ramji* v. *Narrondas Ramji* (2) Mr. Justice Russell referred to certain observations of Mr. Justice Markby in the case of *Komollochun Dutta* v. *Nilruttun Mundle* (14). Those observations are as follows: "The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the will.". That same learned Judge, Mr. Justice Markby, in the case of *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (4) states as follows at page 345: "The executor does not represent the deceased by virtue of the will until he has obtained probate." In the case of *The Administrator-General of Bengal* v. *Premlal Mullick* (7) their Lordships of the Judicial Committee state as follows: "It is not disputed that the immediate effect of Act of 1870 was to place a Hindu executor who was in a

2. (1907) I L R 31 Bom 418 at 428. 3. (1922) I L R 47 Bom 231 at 240.
4. (1878) I L R 4 C 342. 6. (1897) I L R 25 C 103.
7. (1895) I L R 22 C 788 at 796 (P C). 12. (1884) I L R 8 Bom 241.
13. (1886) I L R 10 Bom 468. 14. (1878) I L R 4 C 360 at 362.

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position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August, 1889, and his executors, therefore, *on their obtaining probate,* became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease." Though in that case their Lordships were not referring to the Probate and Administration Act; they were considering the terms of S. 179 of the Succession Act, which is identical with S. 4 of the Probate and Administration Act. In the case of *Sarat Chandra Banerjee v. Bhupendra Nath Bosu* (6), Chief Justice Maclean and Justice Banerjee while holding that an executor under a Hindu will, before the Hindu Wills Act came into force, is not in the same position as an English executor under an English will, decide that the property does not vest in him, and that he holds it only as manager. The learned Judges referring to the preamble of the Act and the heading of Chap. II of the Act state as follows: "Where the estate is unadministered, if any one desire to come in and prove the will and get the benefit of the Act in that sense, he may have the opportunity of doing so, and the effect would be that the estate from that time would vest in such executor under S. 4." Again in the case of *Sakina Bibee v. Mahomed Ishak* (1), Mr. Justice Pugh concludes his discussion of the subject as follows: "It appears to me that in the case of a non-probated will, if I may use the expression, the position must be as it was before the legislation, that is, the will is a gift from the testator to the legatees, and the executor is merely a manager to carry out the intentions of his testator....... In my judgment, therefore, the position of an executor who does not take probate is the same as that of a Hindu or Muhammadan executor before the Succession Act."

In this conflict of view between the various Courts, I am personally inclined to consider that the view taken by the learned Judges in the Calcutta High Court is the correct view. That view is, to my mind, really in accordance with the view of their Lordships of the Judicial Committee in the case of *The Administrator-General of Bengal v. Premlal Mullick* (7). Considering the question, however, not on the authorities but

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1. (1910) I L R 37 C 839 at 844. 6. (1897) I L R 25 C 103.
7. (1895) I L R 22 C 788 at 796 (P C).

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with reference to the Probate and Administration Act, it has to be noticed that the Act is called "An Act to provide for the grant of Probates of Wills and Letters of Administration to the estates of certain deceased persons." And the preamble runs as follows: "Whereas it is expedient to provide for the grant of Probate of Wills and Letters of Administration to the estates of deceased persons in cases to which the Indian Succession Act of 1865 does not apply, *etc.*" It is significant that the object of the Act is not stated to be to legislate about wills or to codify or modify the law relating to wills. S. 4 of the Act is as follows: "The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." It is true that, reading the section by itself it would rather seem to indicate that on the death of the testator the executor becomes his legal representative for all purposes and that the property of the deceased person vests in him as such. But it must be remembered that this section refers also to an administrator, and it cannot possibly be pretended that there can be any administrator till letters of administration are obtained though the letters when obtained relate back to he date of the death of the intestate deceased. There is, therefore, no reason to suppose why, in the case of an executor, a similar result should not have been intended. It is, however, significant that S. 4 appears in Chapter II entitled "Of grant of Probate and Letters of Administration." This heading of the chapter, therefore, further strengthens the view that both the representative character and the vesting accrue only on probate being taken. Then, we have S. 12 which is as follows: "Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such." This makes the meaning of the legislature it seems to me, quite clear. It is only the probate of a will when granted that is said to establish the will from the death of the testator and renders valid all intermediate acts. The clear implication is that if the probate is not granted or obtained, the will is not established from the death of the testator and all intermediate acts of the testator will not be rendered valid. In S. 59, it is provided that probate or letters of administration shall have effect over all the property, moveable or immoveable, of the deceased throughout the Province in which the same is (or are) granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property

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wihch belongs to him. The legislature after providing in Chapter V regarding the practice in granting and revoking probates and letters of administration proceeds in Chapter VI to enumerate the powers of an executor or administrator. S. 90 of the Act runs as follows: "(1) An executor or administrator has subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under S. 4. (2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order." There is no doubt that the clause in sub-section (2) "unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order" would seem to suggest that even in the absence of probate, the property vests in the executor and that he has power to dispose of immoveable property subject only to any restrictions which may be imposed in that behalf by the will. There is real difficulty in construing this clause consistently with the other parts of the Act, and for my part, I am inclined to think that it was a case of mere confused expression and that what the legislature meant to lay down was that if a person appointed executor by a will should wish to dispose of property contrary to the directions contained in the will, he should first obtain probate and then apply to the Court and obtain an order from it authorizing him to do so.

I am therefore of the opinion that the Probate and Administration Act is a mere enabling Act and that person desirous of obtaining the rights created by that Act should first proceed under the Act and clothe themselves with the right by obtaining either probate or letters of administration.

I am confirmed in this view all the more because I cannot possibly imagine that the legislature virtually altered the law of wills in the mofussal without expressly saying so or that the legislature meant to place an executor in the mofussal without probate practically for all purposes in the same position as an executor with probate in Presidency towns.

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None of the learned Judges either of this Court or of the Bombay Court who have decided to the contrary have really given any satisfactory explanation either with regard to the preamble of the Act or the heading of Chapter II or the very clear terms of S. 12

In view, therefore, of the decision in the case of *Ganapathi Aiyar* v. *Sivamalai Goundan* (9), and the conflict of judicial opinion between the Bombay and the Calcutta High Courts in the same matter, I deem it necessary to refer to a Full Bench the question already propounded, namely, the main question in this appeal, "whether an executor appointed by a will made in the mufassal of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the will, or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act."

This Appeal coming on for hearing on Tuesday and Wednesday, the 10th and 11th days of February, 1925, in pursuance of the Order of Reference to a Full Bench, dated 13th November, 1924, upon perusing the Grounds of Appeal, the judgment and decree of the Lower Court and the material papers in the case and the said Order of Reference to a Full Bench and upon hearing the arguments of Mr. A. Krishnaswami Aiyar, vakil for the appellants, and of Mr. Viyanna, vakil for the 16th respondent, and of Mr. G. Lakshmanna, vakil for the respondents 1 and 2, and of Mr. A. Satyanarayana and Mr. P. Bapirazu, vakils for the 3rd respondent and Mr. Ch. Raghava Rao, vakil for the 7th respondent and the appellants having given up respondents Nos. 4, 8, 9, 13, and 14 and elected to proceed without them (*vide* order of Court, dated 25th August, 1921) and the other respondents Nos. 5, 6, 10, 11, 12 and 15 not appearing in person or by pleader and the case having stood over for consideration till this day the Court expressed the following

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OPINION:—*Kumaraswami Sastri, J.*:—The question raised in this reference is "Whether an executor appointed by a Hindu will made in the mufussal of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the will

9. (1912) I L R 36 M 575: 23 M L J 306.

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or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act."

Before the passing of the Hindu Wills Act of 1870, the estate of a deceased Hindu did not vest in the executor even though he obtained probate, and in cases not governed by the Act the right of the executor or legatee could be established either by production of probate or by other proof of the will, probate being only treated as one of the modes by which a will can be proved in Court, and District Courts had no power to grant probate or letters of administration to Hindu wills which were not governed by the Hindu Wills Act. Supreme Courts, however, reserved to themselves the power to grant probate but it was recognised that the grant of probate did not of itself confer any additional powers on executors not governed by the Hindu Wills Act. The position of such an executor was merely that of a manager in so far as the powers which were not expressly conferred on him. *In the Administrator-General of Bengal* v. *Premlall Mullick* (7), their Lordships of the Privy Council in dealing with rights of Hindu executors prior to the passing of the Administrator-General's Act of 1867 observe: "His powers and functions were not those of an English executor but rather those of a manager, but he did not require probate, and probate if obtained would not have vested him with any title to the estate either real or personal which he administered." In view of these observations it is unnecessary to refer in detail to the decisions of the High Courts on the subject. I need only refer to *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5); *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6); *Amulya Charan Seal* v. *Kali Das Sen* (15); *Maniklal Atmaram* v. *Mancharshi Dinsha Coachman* (16).

As regards grants of probate and the proof required of a will not governed by the Hindu Wills Act it was held in *Bharati* v. *Bharati* (17) that before the passing of the Probate and Administration Act, it was not competent to District Courts to grant probate or letters of administration but as pointed out in *Krishna Kinkur Roy* v. *Rai Mohun Roy* (18), the passing of the Probate and Administration Act has altered

5. (1878) I L R 4 C 455 at 468. 6. (1897) I L R 25 C 103.
7. (1895) I L R 22 C 788 at 796 (P C). 15. (1905) I L R 32 C 861.
16. (1876) I L R 1 Bom 269. 17. (1880) 5 C L R 138.
18. (1886) I L R 14 C 37: 11 Ind Jur 141.

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this. It has however been held that there is no obligation cast on a Hindu or Muhammadan executor of wills not coming under the Hindu Wills Act to take out probate and that he can prove the will during the course of the suit just as if he was proving any other document requiring proof. Probate was regarded only as one made of proving a will. I need only refer to *Krishna Kinkur Roy* v. *Rai Mohun Roy* (18), *Krishna Kinkur Roy* v. *Panchuram Mundul* (19), *Bhagvansang Baharagi* v. *Bechardas Harjivandas* (20), *Shaik Moosa* v. *Shaik Essa* (12), *Sakina Bibee* v. *Mahomed Ishak* (1). The Probate and Administration Bill as originally drafted and introduced in the Council proposed to make the production of probate or letters of administration necessary in all cases where the property exceeded Rs. 1,000; but when the Bill was in the Select Committee this provision was deleted. The result is that the Probate and Administration Act is as it stands a measure purely permissive so far as the necessity for taking out probate is concerned.

The question is whether the Probate and Administration Act is only confined to cases where such permission is availed of and a person applies for probate or letters of administration or whether it applies to all cases. So far as the decided cases are concerned, there is a difference of opinion between the view taken by the Madras and Bombay High Courts on one side and the Calcutta High Court on the other. In *Fatima* v. *Shaik Essa* (21) West, J. held that the executor of a will of a deceased Mahomedan executed after the Probate and Administration Act had come into force could not claim to represent the estate of his testator until he had taken out probate. His view was that all classes of executors with regard to the necessity of taking out probate were on the same footing, that S. 12 of the Act showed clearly that the idea at the bottom of the scheme of the Act was that a will was not to be considered established until probate had been taken out and that till probate there was no will "established," that is there was no "Will," at all, exacting recognition of the dispositions made and the authority conferred by it. He held that the Act read as a whole established that probate was necessary in all cases. This view of West, J. was however overruled by Sir Charles Sarjent, C. J. and Bayley, J. in *Shaik Moosa*

1. (1910) I L R 37 C 839. 12. (1884) I L R 8 B 241.
18. (1886) I L R 14 C 37: 11 Ind Jur 141. 19. (1889) I L R 17 C 272.
20. (1881) I L R 6 Bom 73. 21. (1883) I L R 7 Bom 266.

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v. *Shaik Essa* (12), and it was held that by reason of the omission from the Probate and Administration Act which applies to Hindus and Mahomedans of any section corresponding to S. 187 of the Succession Act which requires the production of probate or letters of administration, a right of suit may be established by a Hindu or Mahomedan without taking out probate. Sir Charles Sargent, C. J. was of opinion that S. 12 of the Probate and Administration Act was merely intended to be a condensed statement of the English Law which regards probate as the authenticated evidence of the will itself from which the executor derives his title and by virtue of which the property of the testator vests in him from the death of the testator and not as a condition precedent to establishing his claim. In *Mathuradas* v. *Goculdas Madhowji* (13) it was held following the decision in *Shaik Moosa* v. *Shaik Essa* (12), that an executor who has not taken out probate has the powers of alienation which the English Law confers on executors. In *Narrondas* v. *Narrondas* (2) it was held that the estate of the deceased vested in the executor appointed under the will even though he did not obtain probate. Russell, J. observed as follows:—"The plaintiffs were his executors and by S. 4 of the Probate and Administration Act all his estate vested in the plaintiffs as such." This Court has held S. 4 applicable before probate: [See *Shaik Moosa* v. *Shaik Essa* (12) approved in *Mathuradas Lowji* v. *Goculdas Madhowji* (13) and in *Bai Harkor* v. *Maneklal Rasikdas* (22)]. It seems to have been assumed that the effect of S. 4 would have been to vest the property in the executor of a will made before the passing of the Act, and not governed by the Hindu Law, although probate had not been granted. In *Sir Mahomed Yusuf* v. *Hargovandas Jivan* (3) Marten and Fawcett, JJ., after reviewing the case law on the subject held that the estate vests in the executor under S. 4 of the Probate and Administration Act and that he can convey the property by virtue of the power conferred upon him by S. 90 of the Act even though he has not obtained probate. All the authorities are reviewed by the learned Judges in their judgment.

So far as Madras is concerned the view of the Bombay High Court has been accepted as correct. In *Ganapathi*

2. (1907) I L R 31 Bom 418 at 428. 3. (1922) I L R 47 Bom 231.
12. (1884) I L R 8 Bom 241. 13. (1886) I L R 10 Bom 468.
22. (1887) I L R 12 Bom 621.

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*Aiyar* v. *Sivamalai Goundan* (9), Sundara Aiyar and Sadasiva Aiyar, JJ., held that an executor under the will of a Hindu who has not obtained probate is governed by the provisions of the Probate and Administration Act and can clothe a vendee with full title. Dealing with the argument that the property of the testator would vest in the executor only if he took probate or letters of administration the learned Judges observe "We are unable to uphold this contention. There is no provision in the Probate and Administration Act which requires a person appointed as executor under a will to take out probate or letters of administration. S. 187 of the Indian Succession Act which provides that no right as legatee or executor under a will can be enforced unless probate or letters of administration have been taken out has not been enacted in the Probate and Administration Act. It was imported into the Hindu Wills Act, but it was apparently for very good reasons considered undesirable to embody it in the Probate and Administration Act. Under S. 4 of the Act all the property of the deceased vests in the executor as such. Probate is not necessary to make a person an executor. His title is derived under the will. If S. 187 of the Succession Act had been imported into the Probate and Administration Act, then neither the executor nor any person claiming as alienees under him would be entitled to enforce any right as executor or alienee. But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate. This was the view taken in *Saik Moosa* v. *Shaik Essa* (12) and *Mathuradas Lowji* v. *Goculdas Madhowji* (13). The learned Judges distinguish *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), on the ground that it related to the validity of a sale made by an executor under a Hindu will in the year 1864 long before the Probate and Administration Act was passed and they observed that they could not assume that the learned Judges would have taken the same view in respect of wills made by a person who died after 1881. In *Balakrishnudu* v. *Narayanaswami Chetty* (10), Wallace, C. J., held that the estate of a deceased vests in the executor even though probate has not been taken

6. (1897) I L R 25 C 103. 9. (1912) I L R 36 M 575: 23 M L J 306.
10. (1912) I L R 37 M 175. 12. (1884) I L R 8 Bom 241.
13. (1886) I L R 10 Bom 468.

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out, and observed as follows: "The will is not governed by the Hindu Wills Act and S. 187 of the Indian Succession Act is therefore not applicable. Under S. 4 of the Probate and Administration Act the estate of the deceased vested in the plaintiff as her executor on her death in January, 1904, and there is nothing in that Act to prevent him suing the defendant at once. No doubt if he had omitted to take out probate he could not have obtained a decree without producing a succession certificate, but there is nothing in that Act to prevent his instituting the suit and afterwards obtaining the certificate before decree." In *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao* (11) it was assumed both by Sadasiva Aiyar and Phillips, JJ., who originally heard the appeal and by the Full Bench that the Probate and Administration Act applied to unprobated wills in the mufassal to which the Hindu Wills Act did not apply.

A different view has been taken by the Calcutta High Court. In *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), it was held that an executor under a Hindu will executed before the Hindu Wills Act came into force is not in the same position as an English executor under an English will and that the property does not vest in him but that he holds it only as manager. As pointed out by Sundara Aiyar and Sadasiva Aiyar, JJ., in *Ganapathi Aiyar* v. *Sivamalai Goundan* (9), the will in question was executed before the passing of the Hindu Wills Act and the Probate and Administration Act; but I have little doubt that there are observations in the judgment which support the view taken that the Probate and Administration Act does not apply to cases where probate has not been granted to the executor. Sir William Maclean, C. J. refers to the preamble of the Act and the fact that S. 4 comes in under Chapter II of the Act headed "Of grant of probate and letters of administration" and observes that this indicates that the vesting was only to follow upon the grant of probate of the will in the one case, or grant of letters of administration in the other and that the section applies not only to executors but to administrators who obtain letters of administration under the Act. Banerjee, J., thinks that the provisions of the Act must be taken to be controlled by the preamble of the Act and states that where probate has not been obtained the provisions of the Act would not apply. In *Prosunno Chun-*

11. (1922) I L R 46 M 190: 43 M L J 486.

6. (1897) I L R 25 C 103. 9. (1912) I L R 36 M 575: 23 M L J 306.

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*der Bhuttacharjee* v. *Kristo Chytunno Pal* (4), a decree was obtained against a person who was not the proper legal representative. Subsequent to the decree under the will of the deceased he took out probate and he filed a claim to the property attached in execution of the decree against the defendant in that suit who was only the concubine of the deceased. Markby, J., held that a person who took possession of the estate of a deceased Hindu who had left a will which was not probated must be treated for some purpose as his legal representative until some other claimant comes forward. In the course of his judgment the learned Judge observes that the executor does not represent the deceased by virtue of the will until he has obtained probate, that somebody must have represented the deceased and, must represent the deceased and that the person who was in possession of the estate and managed it till probate was obtained might be treated as the person who was representing the estate. The same learned Judge, however, in *Komollochun Dutt.* v. *Nilrutun Mundle* (14), observed "when the probate is granted it operates upon the whole estate, and (by S. 188) it establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the will. So long as the probate exists it is effectual for that purpose." The question for determination there however, was whether when once probate was granted it can be set aside by a separate suit and it was held that the only way to set it aside was to apply to the Court which granted the probate to revoke the grant. In *Sakina Bibee* v. *Mahomed Ishak* (1) it was held by Pugh, J., following *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), that the powers conferred by the Probate and Administration Act do not apply to an executor who has not taken out probate and that the powers of the executor under such a will must be the same as it was before the passing of the Act. The observations of the learned Judge were, however, *obiter* as the question did not arise for determination.

I may refer to two Calcutta cases decided by their Lordships of the Privy Council which were referred to in the course

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1. (1910) I L R 37 C 839 at 842.
4. (1878) I L R 4 C 342.
6. (1897) I L R 25 C 103.
14. (1878) I L R 4 C 360.

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of the argument. The first is *Administrtor-General of Bengal* v. *Premlal Mullick* (7). The question in that case was whether a Hindu executor who had obtained probate of a will can transfer the administration to the Administrator-General by virtue of the provisions of the Administrator-General's Act, II of 1874. The will was executed in 1889 after the passing of the Probate and Administration Act. Their Lordships of the Privy Council were of opinion that the right conferred by S. 31 of the Administrator-General's Act was not confined to any particular class of executors and that the executor under a Hindu will can take advantage of the provisions of the Act. In the course of their judgment their Lordships of the Privy Council, after pointing out that S. 31 of the Administrator-General's Act of 1874 is a re-enactment, without verbal alterations, of S. 30 of the Administrator-General's Act, 1867 (Act No. XXIV of 1867), make the following observation at p. 796:—"It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August, 1889, and his executors therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease." The words "the executors, therefore, on their obtaining probate became immediately vested by force of statute" are relied upon as supporting the view that the powers of an executor only arise on probate being taken. I do not think that we can hold that these observations which were *obiter* can be taken as an authoritative interpretation of S. 4 of the Probate and Administration Act. The only question for decision was whether a Hindu who obtains probate of a will executed after the passing of the Probate and Administration Act was a person who came within the class of persons empowered to transfer the estate to the Administrator-General under S. 31 of the Administrator General's Act. There is great force in the following observations of Sir E. J. Trevelyan in his book "The Law relating to Hindu Wills":—"Although it was unnecessary to decide this question, these observations would show that an estate

7. (1895) I L R 22 C 788 (P C).

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does not vest in an executor until probate. It is submitted that their Lordships have omitted to consider the words "unless probate has been granted to him," in S. 90 (2) the omission from S. 4 of any reference to probate and the expression of the effects of probate in Ss. 12 and 59, which, it is submitted suggest that the powers of an executor are not dependent upon probate." I may also point out that Sir Rowland Wilson in his work on Muhammadan Law is also of opinion that the powers of an executor of a Muhammadan under a will which is not probated are subject to the provisions of the Act and that without probate he is an executor within the meaning of the Probate and Administration Act except where the contrary appears from the context (*see* page 232, 5th Edition).

Reference has also been made to *Kuvur Tulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan* (8). That was a case where a Muhammadan left a will which under the Muhammadan Law would be invalid to the extent of two-thirds of the estate. The will was executed in 1893 after the passing of the Probate and Administration Act and the question was what the effect of the Probate was as regards two-thirds of the estate which the testator under Muhammadan Law had no power to dispose of. It was held that the grant of probate did not estop the plaintiff from pleading that the will did not operate on two-thirds of the estate. Their Lordships of the Privy Council at page 130 state that, although the Supreme Courts granted probates of Hindu and Muhammadan wills, those Courts never applied the English rule as to the necessity for probate to such wills nor did they attribute to such probates, when granted, the English doctrines as to the operation of probate, and observe as follows: "Under that system a Hindu or Muhammadan executor took no title to property merely as such by virtue of the probate." I do not think this decision throws much light on the question before us.

So far as legislation in Madras is concerned there are two regulations which deal with this matter. One is Regulation III of 1802 and S. 16 gave power to executors of Muhammadans and others to take charge of assets and to execute the trusts mentioned in the will and forbade Courts from inter-

8. (1905) I L R 33 C 116; 15 M L J 336 (P C).

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fering except on complaints. This section, however, was repealed so far as Hindus were concerned by Regulation V of 1829 and the preamble states that the provisions of S. 16 of Regulation III of 1802 were contrary to the provisions of Hindu Law and the authorities prevalent—S. 4 of Regulation V of 1829 says that wills left by Hindus shall have no legal force whatever except so far as their contents may be in conformity with the provisions of the Hindu Law, according to the authorities prevalent in the respective provinces under this Presidency.

I am of opinion that the view taken by the Bombay High Court and by our own Court in *Ganapathi Aiyar* v. *Sivamalai* (9) is correct. As regards the vesting of the estate on the executor before probate is obtained I think the observations of their Lordships of the Privy Council in *Meyyappa Chetty* v. *Subramanyam Chetty* (21) are clear. They observe "It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator including all rights of action—vests in him upon the testator's death." I think there are many practical difficulties in coming to the opposite conclusion. S. 12 of the Probate and Administration Act says that probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such; so that it will be open to the executor to defer taking out probate and after administering the estate with the limited powers of a manager to apply for probate and clothe himself with rights which are far more extensive and which would have retrospective effect. For example, if he sells property before obtaining probate, the sale would not be binding unless there was an express provision in the will or unless it were necessary and beneficial to the estate within the meaning of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweru* (22), but if he takes out probate the alienation would be valid from the date of death of the testator because under S. 90 unless there is an express prohibition, there is no question of necessity. It is not in every case that a purchaser can apply for letters of administration with will annexed. As the view taken by the Madras High Court has always been that the provisions of the Probate and Administration Act apply to cases where pro-

9. (1912) I L R 36 M 575: 23 M L J 306.

21. (1916) L R 43 I A 113. 22. (1856) 6 M I A 393.

bate has not been obtained and as it would unsettle many titles if a contrary view were held we should not do so unless we are satisfied that the view taken till now is clearly erroneous.

Turning to the Probate and Administration Act, I do not think there is anything in the Act which clearly indicates that it is only applicable to executors who take out probate. Executor is defined generally in S. 3 as a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. S. 4 enacts that the executor or administrator, as the case may be, of a deceased person, is the legal representative for all purposes and all the property of the deceased person vests in him as such. No doubt this section comes under Chapter 11 which is headed "Of grant of probate and letters of administration," but I do not think that this fact has much bearing on the general words of the section, nor do I think that the fact that an administrator gets title only from the date of the grant of letters of administration throws much light on the question. I think the meaning of the section is that property will vest in both of them but that in the case of an executor it vests from the date of the death of the testator, but by virtue if Ss. 14 and 15 an administrator being merely a person to whom the Court confides the management of the estate the property vests in him from the date of the grant of letters of administration and not before. I do not think there is much point in the contention that because executors and administrators are both referred to in S. 4 and because an administrator's rights commence from the date of the grant a similar restriction should be placed upon the executor who derives title from the will of the testator. S. 90, I think, makes the point clear. It distinctly applies to both executors who have taken out probate and those who have not. Cl. (1) gives the executor or administrator power to dispose of all or any of the property for the time being vested in him under S. 4 and cl. (2) says that if the will contains a restriction and the executor wants to sell property, he should obtain probate and get the leave of the Court. It is difficult to read S. 90 as not applying to unprobated wills. It clearly contemplates the vesting of property in the executor who has not obtained probate. It is no doubt true that in the preamble it is stated that it is expedient to provide for the grant of probate wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act does not apply but I do

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Kumaraswami Sastri, J.

not think that this fact alone should be taken as conclusive on the question. It seems to me that if the legislature intended that only wills which are probated should be governed by this Act, it would have said so in unequivocal terms, and in the absence of any such statement I do not think I will be justified in holding that the Act is not applicable to cases where probate has not been obtained. There are several sections in the Act which have nothing to do with probate and which are general in their character and there is no reason why such provisions should not be applied to Hindu wills of which probate has not been obtained. I think there is great force in the observations of Sir Charles Sargent, C. J. in *Shaik Moosa v. Shaik Essa* (12) where the learned Judge observes that the object of the legislature in enacting the Probate and Administration Act seems to have been to frame an act which would be applicable to all natives of this country whilst leaving the existing law as to those Hindus, to whom the Hindu Wills Act apply untouched.

I would answer the reference by stating that in cases of Hindu wills to which the Hindu Wills Act does not apply the estate vests in the executor (who accepts office) from the date of the testator's death and that the provisions of the Probate and Administration Act are applicable even though probate has not been obtained.

*The Chief Justice*:—I agree.

*Phillips, J.*:—I agree.

T. S. V. *Reference answered.*

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PRIVY COUNCIL

[On Appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

Man Singh ... *Appellant**

v.

Nawlakhbati and another ... *Respondents.*

P. C.

Mansing v Nawlakh bati

*Hindu Law—Court of Wards Act (IX of 1879)—Widows declared wards of the Court of Wards—Their subsequent surrender and charge of part of their life-interest to next reversioners without assent of the Court—Illegality.*

Two Hindu widows, who had been made wards of the Court of Wards Act (IX of 1879) with an ample monthly maintenance-allowance from their deceased husband's estate, executed, without the knowledge or sanction of the Court of Wards, a deed of surrender of their life-interest in favour of their

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*P C Appeal No. 95 of 1924. 2nd December, 1925.

12. (1884) I L R 8 Bom 241 at 254.

grandsons, who in their turn and in exchange executed an *ekrarnama* guaranteeing them an increased maintenance allowance and the upkeep and worship of the family deities.

*Held*, (1) the surrender was void under S. 60 of the Act, as having been made without the sanction of the Court of Wards; (2) it was also void under the general Hindu Law as, combined with the *ekrarnama*, it amounted to a surrender of part only, and not the whole, of their interest in their deceased husband's estate. *Rangaswami Goundan* v. *Nachiappa Goundan*, (1918) 46 I A 72: 36 M L J 493 and *Sureswar Misser* v. *Mahashrani Misrain*, (1920) 47 I A 233: 39 M L J 161 followed.

Appeal from a decree of the High Court (Das and Kulwant Sahay, JJ.) dated 6th April, 1923, affirming a decree of the Subordinate Judge of Bhagalpur (R. C. Chaudhuri, Esq.), dated the 5th June, 1922.

The facts and material documents are set forth in their Lordships' judgment.

*L. de Gruyther, K. C.* and *S. Hyam* for appellant.—By the registered deed of surrender of the 18th December, 1918, the two Maharanis, widows of Maharaja Harballav Singh Bahadur relinquished their right as Hindu widows, as they were entitled by Hindu Law to do, to the deceased's estate, thus accelerating the succession of the immediate reversioners. On the 23rd December, they completed their act of relinquishment and surrender by writing to the Collector of Bhagalpur, notifying him of the same. Their act created no charge upon or interest in their property, but divested them of their title there. The reversioners then succeeded to the estate of the Maharaja, and not to that of his widows, by operation of the Hindu Law of succession; and S. 60 of the Court of Wards Act (IX of 1879) did not apply to the case, as erroneously held by the Lower Courts. So long as there was complete renunciation, actual delivery of possession was unnecessary.

*Sir G. Lowndes, K. C.* and *E. B. Raikes* for respondents.—Under S. 60 of the Court of Wards Act, the widows were not competent to surrender their life-interests without the approval of the Court whose wards they were, and the appellant has no rights under the deed. Further, the effect of the whole transaction (deed of surrender and Ekrarnama combined) was to create a charge upon the property, which previous pronouncements of this Board have declared to be illegal; *Rangasami Gounden* v. *Nachiappa Gounden* (1); *Sureshwar Misser* v. *Mahashrani Misrain* (2).

1. (1918) 46 I A 72: 36 M L J 493.
2. (1920) 47 I A 233: 39 M L J 161.

2nd December, 1925. The Judgment of the Board was delivered by

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SIR JOHN EDGE:—This is an appeal from a decree, dated the 6th April, 1923, of the High Court at Patna, which affirmed a decree, dated the 5th June, 1922, of the Additional Subordinate Judge of Bhagalpur.

The parties to the suit in which this appeal has arisen are Hindus, by caste Rajput, of the district of Bhagalpur, who are governed by the law of the Mitakshara, and the following pedigree shows how they are related:—

Maharani Tarabati, first wife, died August, 1920. — Maharaja Hariballab Narain Singh, K.C.I.E., died 1 April, 1907. — Maharani Nowlakhbati, a defendant and 1st respondent.

| (child of Maharani Tarabati and the Maharaja)

Padmabuti, died 20 May, 1915. — Rao Lakat Singh, dead.

| (their children)

Gobind Singh, died October, 1919. — Rudra Pratab Singh, a defendant and 2nd respondent.

| (son of Gobind Singh)

Man Sigh, plaintiff and appellant.

Sir Hariballab Narain Singh died intestate on the 1st April, 1907, possessed of the Sonbarsa estate, which was situate principally in the district of Bhagalpur and produced an income of about two lakhs of rupees a year. On his death his two widows, Maharani Tarabati and Maharani Nowlakhbati, succeeded him in the possession of the estate On the 30th April, 1907, the two widows, who were Pardanashin ladies, jointly presented to the Collector of Bhagalpur a petition in which they alleged that the estate was heavily involved in debt, that there were large arrears of income to be collected, and that they were unable to manage the estate, and asked that they should be held under S. 6 of the Court of Wards Act, 1879, to be disqualified proprietors, and should be declared by the Court of Wards incompetent to manage their own property and that the estate should be taken over by the Court of Wards. That application was forwarded by the Collector to the Court of Wards, and thereupon the Court of Wards under S. 27 of the Act made on the 27th May, 1907, an order declaring that the widows were incompetent to manage their own property and declaring that it was determined under S. 35 of

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the Act that the Court of Wards should take charge of the property of the widows and directed that possession of such property should be taken on behalf of the Court of Wards. Thereupon the widows became wards of the Court of Wards. The Court of Wards allowed to each of the widows Rs. 625 a month for her maintenance. On the death of Maharani Tarabati in 1920 the monthly allowance made by the Court of Wards to Maharani Nowlakhbati for her maintenance was increased to Rs. 1,250. The widows and the survivor of them continued to live in the family house of the Sonbarsa estate.

On the 18th December, 1918, the widows, as parties of the first part, and Gobind Singh and Rudra Pratab Singh, as parties of the second part, made a deed, written in English, which, omitting the schedule, is so far as is material as follows:—

(Sd.) Sri Maharani Teravati. By my own pen.

(Sd.) Sri Maharani Navalakhvati. By my own pen.

This INDENTURE made the eighteenth day of December of the Christian year One Thousand Nine Hundred and Eighteen BETWEEN Maharani Tarabati and Maharani Nowlakhbati, the senior and the junior widow respectively of the late Maharajah Harballabh Narain Singh Bahadur, K C I E, residing at Sonbarsa in Thana Sonbarsa, Pargana Nisankhpur Korha, District Bhagalpur, hereinafter called the First Party of the one part; and Rao Bahadur Govind Singh and Rudra Pratab Singh, sons of the late Rao Bahadur Takat Singh and daughter's sons of the said Maharaja Harballabh Narain Singh Bahadur, K. C. I. E., residing at Barware, in the Jeypore State in Rajputana, hereinafter called the Second Party of the other part, WHEREAS the late Maharaja Harballabh Narain Singh Bahadur, K. C. I. E., died intestate on the 1st day of April, 1907, leaving considerable property, moveable and immoveable, commonly called the Sonbarsa Estate, mostly situate in Pargana Nisankhpur Kurha in the Sub-division of Madhipura, District Bhagalpur, and leaving behind him no male issue but only two widows, namely, the First Party and an only daughter, namely, Maharaja Kumari Padmabati, mother of the Second Party, and two daughter's sons by the said daughter, namely, the Second Party. AND WHEREAS on the death of the said Maharaja Bahadur the First Party succeeded to and came into possession of all property, moveable and immoveable, left by him, with rights of Hindu widows under the Benares School of Hindu Law, which governs the family of the said Maharaja Bahadur AND WHEREAS by reason of the First Party being Pardanashin ladies incapable of managing a big property like the Sonbarsa Estate, the Court of Wards has taken up the management of the said Estate under the provisions of Act IX of 1879 (B C) on their behalf, and is at present managing the property through Rai Sahib Nilmoney Dey, Manager appointed under the provisions of the said Act AND WHEREAS the First Party are now getting a monthly allowance of Rs. 625 (Rupees Six hundred and twenty-five) each from the Court of Wards for their respective maintenance. AND WHEREAS the said Maharaj Kumari Padmabati died on the Twentieth day of May, 1915, AND WHEREAS the

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First Party are now growing old and are desirous of remaining aloof from the concerns of the world and are spending their latter days in Divine Worship and meditation in the Holy City of Benares, with an allowance for their maintenance befitting their rank and position. AND WHEREAS for the reasons aforesaid the First Party wish to relinquish and surrender their Hindu widows' estate in the said property left by the said Maharaja Bahadur, their deceased husband, to the next heirs, the Second Party who have undertaken to pay them or the survivor of them, out of the income and profits of the said Estate left by the said Maharaja Bahadur, the monthly sum of Rs. 2,000 (Rupees two thousand) for maintenance and also to defray the expenses of the daily and periodical worship of the family deities Lachhmi Narayan Jeo, Ram Chandra Jeo and Radha Krishan Jeo, at a cost of Rs. 100 (Rupees one hundred) per mensem. AND WHEREAS the Second Party have agreed to all the terms aforesaid.

NOW THIS INDENTURE WITNESSETH:—

1. That the First Party Maharani Tarabati and Maharani Nowlakhbati do hereby relinquish and surrender all their rights in the property moveable and immoveable, left by their husband, the late Maharaja Harballabh Narain Singh Bahadur, K. C. I. E., commonly called the Sonbarsa Estate, now in the charge and under the management of the Court of Wards to and in favour of the Second Party Rao Bahadur Gobind Singh and Rudra Pratab Singh, the next heirs of the said Maharaja Bahadur under the Hindu Law, and in pursuance thereof the First Party do hereby make over the entire property aforesaid to the Second Party in full extinction of their rights therein as Hindu widows.

2. That the Second Party will be entitled to the whole property aforesaid from this date and they will hold and enjoy the same in the rights of daughter's sons succeeding to the property of their maternal grandfather under the Benares School of Hindu Law, the share of each being a moiety of the said property.

3. That the Second Party will be entitled to have their names entered as proprietors in equal share in respect of the revenue-paying or revenue-free estate included in the said property by removing the names of the First Party now recorded in the Registers maintained under Act VII of 1876 (B. C.).

4. That the First Party will at once inform the Court of Wards of this surrender and request the Court to make over the charge and management of the said property to the Second Party subject to the Court's retaining the management if it thinks fit, under S. 13-A of the said Act IX of 1879 (B. C.).

5. That the First Party or the survivor of them, will be entitled to receive a maintenance allowance of Rs. 2,000 (Rupees two thousand) per mensem, from the Second Party out of the rents and profits of the said property so long as they or either of them live or lives.

6. That the Second Party undertake to keep up and maintain the daily and periodical worship of the family deities Lachhmi Narayan Jeo, Ram Chandra Jeo, and Radha Krishna Jeo, installed at the Sonbarsa House left by the said Maharaja Bahadur, at a cost of Rs. 100 (Rupees one hundred) per mensem, and should they omit or neglect to carry out this undertaking the First Party will be entitled to inforce the fulfilment thereof.

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In WITNESS WHEREOF the said parties to these presents have hereunto set their hands and seals the day and year first above written in the presence of:—

*Witnesses.*—(1) Bindhyeswari Prasad Singh, High Court Vakil, Monghyr.

(2) Ajodhya Prasad Choudhary, M. C., resident of Kassim Bazaar, Monghyr.

*Witness.*—Prabhu Charan Ambasta, Bhikhanpur, Bhagalpur.

" Bindyeswari Prasad Sing, Vakil, Monghyr.

" Anirudh P. Singh *Pleader* and Zamindar, Panjwara, Bhagalpur.

" Ram Chandra Singh of Mohanpur, Bhagalpur.

" Ram Chandra Singh of Mauza Chakla Hanuman Nagar. By my own pen.

" Babu Nirbhay Narayan Singh of Bindwara, Pargana Monghyr. By my own pen."

The deed was registered on the 18th December, 1918.

On the same day, 18th December, 1918, Gobind Singh and Rudra Pratab Singh by their ekrarnama agreed in writing with the widows so far as is material as follows:—

"This agreement made on the 18th (Eighteenth) day of December one thousand nine hundred and eighteen between Rao Bahadur Gobind Singh and Rudra Pratab Singh, *alias* Begai Singh, sons of the late Rao Bahadur Lakat Singh and daughter's sons of the late Maharaja Harballab Narain Singh Bahadur, K C I E, residing at Barwara in the Jaipur State, Rajputana, hereinafter called the first party of the one part and Maharani Tarabati and Maharani Nowlakhbati, the senior and the junior widows, respectively of the said Maharaja Hariballab Narain Singh Bahadur, K C I E, residing at Sonbarsa, in Thana Sonbarsa, Pargana Nisankpur Karha, District Bhagalpur, hereafter called the Second Party of the other part, whereas the said Maharaja Harballab Narain Singh Bahadur, K C I E, died intestate on the 1st April, 1907, leaving considerable property moveable and immoveable, commonly called the Sonbarsa estate, mostly situate in Pargana Nisankpur Karha in the Sub-Division of Madhipura, in the District of Bhagalpur, but also situate in part in Pargana Farakya in the District of Monghyr and leaving behind him no male issue, but only two widows, namely the second party, and an only daughter, namely, Maharaj Kumari Padmavati, mother of the First Party and two daughter's sons by the said daughter namely the First Party. And whereas on the death of the said Maharaja Bahadur, the Second Party succeeded to and came into possession of all property, moveable and immoveable, left by him with rights of Hindu widows under the Benares School of Hindu Law, which governs the family of the said Maharaja Bahadur, and whereas by reason of the Second Party being Pardanashin ladies, incapable of managing a big property like the Sonbarsa estate the Court of Wards has taken up the management of the said estate, under the provision of Act IX of 1879 (B. C. on their behalf, and is at present managing the property through Rai Sahib Nilmony Dey, Manager appointed under the provisions of the said Act: And whereas the said Maharaj

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Kumari Padmabati died on 20th (Twentieth) day of May, 1915. And whereas the Second Party, who are now growing old and are desirous of remaining aloof from the concerns of the world, and of spending their latter days in Divine worship and meditation in the holy city of Benares, have proposed to surrender their estate to the first party who are now the next reversionary heirs of the said Maharaja Bahadur under the Hindu Law on getting a suitable maintenance for the remainder of their natural lives, and an assurance that the worship of the family deities at Sonbarsa should be kept up and maintained in the proper stage by the First Party. And whereas the First Party have agreed in the event of the said surrender being made, to give the Second Party or the survivor of them, a maintenance allowance of Rs. 2,000 (Rupees two thousand per mensem, and also to keep up and maintain the worship of the said family deities in a suitable style at the cost of Rs. 100 (Rupees one hundred) per mensem. And whereas the second party consider the said amount of maintenance allowance and of the expense of worship fair and reasonable, and therefore they are executing the deed of surrender contemplated by them. The First Party, therefore, in consideration of the premises, do hereby agree of their own free will and accord that from the day they became the proprietors of the said Sonbarsa estate, by reason of the surrender aforesaid they and their heirs, successors, executors, administrators and assignees shall pay to the Second Party or the survivor of them, so long as they or either of them live or lives, the monthly sum of Rs. 2,000 (Rupees two thousand) for their maintenance in a style suitable to the rank and position held by their deceased husband, and if they fail to pay the allowance due for any months (which is to be taken as an English month) on the first day of the following month, the Second Party will be at liberty to enforce the payment thereof, with simple interest at the rate of twelve per cent. per mensem, by process of Court, and the said arrears of allowance, with interest and the costs of the suit if any to enforce the payment thereof shall be the first charge on the property mentioned in the schedule hereto annexed which form a part of the estate surrendered by the Second Party as mentioned above. And the First Party further agree, that from the day aforesaid they shall keep up and maintain the daily and periodical worship of the family deities Lachmi Narain Jeo, Ramchander Jeo, and Radha Krishen Jeo, installed at the Sonbarsa house left by the said Maharaja Bahadur, at a cost of Rs. 100 (Rupees one hundred) per mensem (the month being taken as an English month), and should they omit or neglect to carry this agreement the Second Party will be entitled to enforce the fulfilment thereof. In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written in the presence of witnesses (1) Bindheyswari Prasad Singh, High Court Vakil, Monghyr, (2) Ajodhya Prasad Chaudhury M. C. resident of Kasim Bazaar, Monghyr."

That agreement was registered on the 18th December, 1918.

On the 23rd December, 1918, the two widows sent the following letter to the Collector of Bhagalpur:—

*Dated Bhagalpore, the 23rd December, 1918.*

To

The Collector of Bhagalpore.

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Sir John Edge,

SIR,

We have the honour to state the following for your information:—

That we are disqualified proprietresses of the Estate known as the Sonbarsa Estate and we are Wards of the Court.

That we have two grandsons named Rao Bahadur Gobind Singh and Rudrapratab Singh.

That for sometime past we had been contemplating surrendering our rights to the estate in favour of our grandsons who are the reversioners to the Estates and we had informed Mr. B. C. Sen, I. C. S., the then Collector and the Hon'ble Mr. H. J. McIntosh, I. C. S., the then Commissioner; informally about our intentions.

That we have kept Mr. Sen informed informally about all the steps that we have been taking in connection with our intention to surrender the Estate.

That we had taken the best legal advice (*e. g.*) of the Government Advocate, Bihar and Orissa and Government Pleader, Bhagalpore, and we were given to understand that under the law we had every right to surrender the estate in favour of our two grandsons.

That in pursuance of our intentions to keep the authorities informed about all our actions in connection with the surrender, we so far back as March, 1918, sent a copy of the proposed deed of surrender to the Collector of Bhagalpore with our forwarding letter, dated the 4th March, 1918.

That we have executed and registered the deed of surrender on the 18th instant and as provided in para. 4 of the said deed we beg to inform you about the same and request you to take steps to make over the charge and management of the said properties to Rao Bahadur Gobind Singh and Rudrapratab Singh, our two grandsons aforesaid, if the Court of Wards do not think fit to retain management under S. 13 (*a*) of Act IX of 1879 (B. C.).

That we have been given to understand that our two grandsons aforesaid are applying for the mutation of their names in the registers maintained under Act VII of 1876 (B. C.) and that we have no objection to their so doing.

We have the honour to be,

Sir,

Your most obedient servants,

(Sd.) Sri Maharani Tarabati.

(Sd.) Sri Maharani Nowlakhbati,

*Maharanis of Sonbarsa.*"

The gentleman whom the widows mentioned as the Government Advocate and Government Pleader in giving any advice to the widows acted as their legal adviser, and not in any respect as representing the Court of Wards.

On the 15th April, 1919, the Court of Wards through their Deputy Collector sent the following reply to the widows to their petition of the 23rd December, 1918:—

"To

Maharani Tarabati Kumari and Nowlakhabati Kumari, Sonbarsa.

Their petition no. *Nil*, dated 23rd December, 1918.

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The Maharanis of Sonbarsa are informed that the Board of Revenue, Bihar and Orissa considers that the deed of relinquishment executed by them in favour of their grandsons is invalid.

(Sd.) H. Bhattacharyja, Wards Deputy Collector."

The Court of Wards had never given any sanction to the widows or to either of them to create any charge upon or interest in the property of the wards or any part thereof.

In February, 1919, Gobind Singh applied to the Court of the Deputy Collector of Bhagalpur for mutation of names in his favour in respect of an eighth share in the estate on the ground that he had a right to the moiety of the estate, his contention being that the deed of the 18th December, 1918, operated as a surrender of the interests of the widows of their interests in the estate. Rudra Pratab Singh did not oppose the application. The application was opposed by the Manager of the Court of Wards on various grounds, one of which it is only necessary in the view their Lordships take of the law applicable to the case to consider, and that is that the Court of Wards had not sanctioned the so-called surrender and that it was consequently invalid under S. 60 of the Court of Wards Act, 1879. That section is as follows:

"60. No ward shall be competent to create, without the sanction of the Court, any charge upon, or interest in, his property or any part thereof."

The Court in that section mentioned was the Court of Wards. Gobind Singh's application for mutation of names was rejected.

Gobind Singh died in October, 1919. Maharani Tarabati (the first wife) died in August, 1920. Man Singh, who was the son of Gobind Singh, brought this suit on the 17th January, 1921. In his plaint Man Singh referred to the deed of the 18th December, 1918, and relied upon it as a surrender by the widows of their interest as proprietors of the Sonbarsa estate and as having vested that estate in his father, Gobind Singh, and in Rudra Pratab Singh. The eleventh, twelfth and thirteenth paragraphs of the plaint state the title upon which the suit was brought, thus:—

"11. That by the said deed of surrender the said Maharanees having put an end to their life estate as Hindu widows in favour of the entire body of the then reversioners the aforesaid Rao Bahadur Gobind Singh and Rudra Pratab Singh the defendant, second party in the aforesaid Sonbarsa estate; all the properties both moveable and immoveable appertaining to the said Sonbarsa Estate vested solely and absolutely in the said reversioners who became

entitled to hold, possess and enjoy the aforesaid state as the absolute owners of and successors to the properties left by their maternal grandfather by right of inheritance under the Benares School of Hindu Law.

12. That as the aforesaid heritage being one which is known as obstructed heritage, the plaintiff's father, Rao Bahadur Gobind Singh and Rao Bahadur Rudra Pratap Singh, the defendant, Second Party acquired equal rights in the same and the share of each being a moiety of the said properties.

13. That the plaintiff's father, Rao Bahadur Gobind Singh, died in October, 1919, leaving the plaintiff his only son and the sole heir to his estate and he is lawfully entitled to all the rights and interest acquired by his late father in the aforesaid Sonbarsa estate by virtue of one aforesaid deed of surrender."

Man Singh, the plaintiff, prayed for the following amongst other reliefs:—

"(*a*) That the Court be pleased to declare that by the deed of surrender and the Ekrarnama, dated the 18th of December 1918 the plaintiff's father and the defendant 2nd party became entitled as the next immediate reversionary heirs of the late Maharaja Sir Harballab Narain Singh Bahadur, K. C. I. E., to all the properties left by him and the defendant, 1st party has no right to withhold possession of the Sonbarsa Estate from the plaintiff and the defendant 2nd party.

(*b*) That the Court be pleased to pass a decree for recovery of possession of all the properties moveable and immoveable mentioned in Schs. A and B annexed to the plaint as well as any other properties that may be found on discovery to appertain to the Sonbarsa Estate in favour of the plaintiff and the defendant, 2nd party, by dispossessing the defendant, 1st party."

In Schedule B of the plaint, which contains a list of the moveable properties which were claimed, carriages, palkis, cattle, elephants, bullocks, cows, buffaloes, horses, and other things are mentioned as having been retained in the possession of Maharani Nowlakhbati.

The defendants, Maharani Nowlakhbati and Rudra Pratab Singh filed separate written statements. The Maharani Nowlakhbati in her written statement pleaded amongst other things that the widows being disqualified persons and their estate being under the management of the Court of Wards, they had no authority to execute the alleged deed of surrender without the sanction of the Court of Wards and that the plaintiff's father did not acquire any valid title under the said deed, and also did not admit as correct the view of the law propounded in paragraphs 12 and 13 of the plaint and put the plaintiff to proof of his title.

The defendant Rudra Pratab Singh in his written statement pleaded amongst other things that the alleged deed of surrender was not a surrender of the whole interest of the

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Maharani's and was void and illegal, and also that it was void and ineffectual as not having the sanction of the Court of Wards. Rudra Pratab Singh by his written statement put the plaintiff to proof of his title.

The Subordinate Judge framed twelve issues, of which the fifth is in the opinion of their Lordships the crucial issue in this case. It was "5. Is the deed of surrender valid having regard to the provisions of S. 60 of the Court of Wards Act (IX of 1879)? If it is found that the deed of the 18th December, 1918, was in contravention of that section the plaintiff's suit fails and this appeal fails, and it is not necessary for their Lordships to consider whether the widows understood the deed or had executed it under any misrepresentation as to its object or effect, or without any independent advice, or to consider any other issue, or the questions of law raised in the eleventh paragraph of the written statement of the Maharani Nowlakhbati, which was that "the plaintiff should prove that he is entitled to a moiety share in the Sonbarsa estate, even if the said deed of surrender be held to be a valid document." Whilst saying this, their Lordships feel it right to say that the lengthy and elaborate judgments of the Courts below have been of assistance to them in understanding the facts which were in dispute between the parties to this suit.

In this case no question, that there was any necessity for the surrender, arose. There was in fact no necessity for a surrender of the interests of the widows. The Subordinate Judge and the High Court in appeal concurrently found in effect that the parties to the deed of the 18th December, 1918, intended by that deed that the widows should surrender some of their interests in the Sonbarsa estate to Gobind Singh and Rudra Pratab Singh, and that the so-called surrender was void as being in contravention of S. 60 of the Court of Wards Act, 1879. Those learned Judges might have found on the facts that the deed was void independently of S. 60 of the Act.

The question as to whether a surrender without necessity by a Hindu widow of her widow's interest in her deceased husband's estate, even in favour of the nearest reversioner, is valid was considered by the Board in *Rangasami Gounden* v. *Nachiappa Gounden* (1). In the judgment of the Board in that case, at page 84, it was said that:—

"The result of the consideration of the decided cases may be summarized thus: (1) An alienation by a widow of her

1. (1918) 46 I A 72: 36 M L J 493.

P. C.

Man Singh *v.* Nawlakhbati.

Sir John Edge.

deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner."

In *Sureshwar Misser* v. *Mahashrani Misrain* (2), the Board affirmed that pronouncement of the law. In the latter case, in which the parties were subject to the law of the Mithila school, the widow of the deceased proprietor on the death of her infant son took absolutely the moveable property. In that case there were serious disputes in the family as to title and the next reversioners to the son sued the widow and her daughters to set aside the will of her husband under which the daughters were entitled to succeed to the immoveable property on the death of the son without issue. A family compromise was agreed to, and in performance of it the widow surrendered all her rights of succession to the immoveable property, and the plaintiff the next reversioner, and her daughters gave her for her life a small portion of the land for her maintenance. The Board held that the compromise was a *bona fide* surrender of the estate, and not a device to divide it with the next reversioner, the giving of a small portion of it to the widow for her maintenance not being objectionable, and consequently that the transaction was valid under the principles laid down by the Board in *Rangasami Gounden* v. *Nachiappa Gounden* (1).

The so-called surrender in the present case was, as stated above, void in law, and was also void as being in contravention of S. 60 of that Act.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Barrow, Rogers* and *Nevill.*

Solicitors for respondents: *Watkins* and *Hunter.*

A. de M. *Appeal dismissed.*

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(1918) 46 I A 72: 36 M L J 493.

2. (1920) 47 I A 233: 39 M L J 161.

## PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

Jawahir Singh ... *Appellant**

*v.*

Udai Parkash and others ... *Respondents.*

P. C. Jawahir Singh *v.* Udai Parkash.

*Hindu Law—Joint family—Sale of ancestral property by managing member—Legal necessity—Antecedent debt—Sale unquestioned by vendor's eldest son—Suit by his younger sons—Limitation Act (IX of 1908).*

About the year 1900, *H*, managing member of a joint Hindu family, mortgaged its ancestral property to *G*, and later, with a view to redeeming this mortgage, negotiated to sell the property to *U* for Rs. 13,000. The sale deed was prepared, but before it could be executed, one *D* sued for, and was decreed his customary right of pre-emption of the property at the same figure, Rs. 13,000. In the meantime, during the pendency of the pre-emption suit, *G's* mortgage debt was paid off, and when ultimately the pre-emption sale was effected, *H*, the vendor, executed a receipt for Rs. 13,000, which included repayment of Rs. 1,400 due for money lent with interest on a promissory note by *D* about 1900. *H* appropriated the money received to his own use. His eldest son, however, on attaining majority did not impugn the sale; but the younger sons in 1919 brought an action to set it aside, *D* contended that (1) the sale had been for good consideration, and for legal necessity, to pay off the antecedent debts on the mortgage and the promissory note; (2) the indifference or acquiescence of the eldest son who succeeded it to the father in the management of the family property bound and estopped the junior members of the family, and the younger sons' action was barred under the Limitation Act (IX of 1908), Ss. 7 and 8.

*Held,* (1) though the intended sale to *U* was for the purpose of paying off the antecedent mortgage debt, the actual sale to *D* was not in fact intended or effectuated to discharge that or any other antecedent debt; *Sahu Ram Chandra* v. *Bhup Singh,* 44 I A 126: 33 M L J 14 distinguished; (2) the eldest son's conduct did not estop or make time run against the younger sons, and the construction put upon Ss. 7 and 8 of the Limitation Act (IX of 1908) in *Ganga Dyal* v. *Mani Ram,* 31 A 156 is preferable to that of *Vighneswara* v. *Babayya,* 16 Mad 436 or *Doraisami* v. *Saluvar,* (1912) 38 Mad 118: 25 M L J 405.

Appeal from a decree, dated the 3rd July, 1923, of the High Court (Grimwood Mears, C. J. and Piggott, J.) varying a decree of the Subordinate Judge, Meerut (P. K. Ray, Esq.), dated the 6th August, 1920.

The facts appear from the judgment of their Lordships.

*B. Dube* for appellant:—The negotiations for the sale to *U* and the actual sale to *D* had the same effect, viz., dis-

*P C Appeal No. 22 of 1924. 4th December, 1925.

P. C.

Jawahir Singh v. Udai Parkash.

charge of a pre-existing debt, and it cannot be denied that the latter was for good consideration. [*Sahu Ram Chandra* v. *Bhup Singh* (1)]. Further, *H's* eldest son by his conduct has shown that the sale was right and proper, and his attitude, as that of the managing member of the family in succession to his father, the vendor, binds the other members of the family including his younger brothers, and makes time run against them under the Limitation Act (IX of 1908), Ss. 7 and 8. The High Court have naturally followed their own ruling on the interpretation of these sections in *Ganga Dyal* v. *Mani Ram* (2), but it is submitted the rulings of the Madras High Court in *Vighneswara* v. *Babayya* (3) and *Duraiswami* v. *Saluvar* (4) are sounder and preferable.

The respondents were not represented.

4th December, 1925. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI:—This is an *ex parte* appeal from a decree of the High Court at Allahabad, dated the 3rd July, 1922, and arises out of a suit brought by the plaintiffs on the 14th September, 1919, for a declaration that a sale effected by their father, Harbans Singh, in 1906, in favour of one Dalip Singh, was not justified by any such necessity as would validate the transaction against the other members of the joint family of which Harbans Singh was the head. Dalip Singh's interests have been acquired by the present appellant, Jawahir Singh. The Trial Judge held that the plaintiffs had not made out a sufficient case to invalidate the sale to Dalip Singh. He was also of opinion that the plaintiffs' claims were barred by the Statute of Limitation (Act IX of 1908) as Fateh Singh, their eldest brother, had attained majority long ago and had not questioned the sale. He accordingly dismissed the plaintiffs' suit.

On appeal to the High Court the learned Judges overruled the plea of limitation. They relied on the decisions of their own Court (2) and differing from the view taken by the Madras High Court [*Vighneswara* v. *Babayya* (3); *Doraisami* v. *Saluvar* (4)] on which the Subordinate Judge had rested his judgment, they held that the conduct of Fateh Singh, the eldest brother, did not affect the undoubted rights of the plaintiffs. They also held that, save and except Rs. 1,400, the defendant appellant had failed to establish that the con-

1. (1917) I L R 39 A 437: 44 I A 126: 33 M L J 14.
2. (1908) I L R 31 A 156. 3. (1893) I L R 16 M 436: 3 M L J 216.
4. (1912) I L R 38 M 118: 25 M L J 405.

P. C.

Jawahir Singh *v.* Udai Parkash.

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sideration for the transfer of the property to Dalip Singh was for any such necessity as would make the transaction valid against the sons. They accordingly set aside the order of the First Court and made a decree in favour of the plaintiffs for recovery of the property in suit, subject to their paying into Court within three months from the date of their decree, for the benefit of the defendant, Jawahir Singh, the sum of Rs. 1,400. They further directed that if payment should not be made within the prescribed period the suit should stand dismissed with costs throughout.

From this decree Jawahir Singh has appealed to His Majesty in Council. The same contentions that were urged in the High Court have been advanced before the Board. It becomes necessary, therefore, to set out some of the facts which have either been established or admitted in these proceedings.

Harbans Singh, the father, at the time he sold the property to Dalip Singh, owned a moiety of the village of Shikohpur, in the District of Meerut. The property was admittedly ancestral, in which his sons were jointly entitled. The family consisted of himself and three sons, the eldest of whom, Fateh Singh, is defendant No. 3.

Sometime in 1900 Harbans Singh became involved in debt, and he appears to have executed a mortgage of the property in favour of three money-lenders, Girwar Singh and two others. In order to discharge this debt Harbans Singh entered into negotiations with one Udai Singh for the sale of the family property. A sale deed was actually drawn up in his favour for a consideration of Rs. 13,000. Thereupon Dalip Singh put forward a claim of preemption in respect of the property that was going to be sold. His right of pre-emption was based on the village custom which, being questioned, came before the Court and was judicially affirmed. The price of Rs. 13,000 was fixed for the joint family's moiety. The pre-emption decree in favour of Dalip Singh bears date the 27th of August, 1906. Dalip Singh, it is admitted, paid Rs. 13,000 to Harbans Singh, which he unquestionably appropriated to his own use. It further appears that whilst the pre-emption suit was proceeding the debt to Girwar Singh and the two other money-lenders was admittedly paid off. At the time of the pre-emption sale Harbans Singh executed a receipt for Rs. 13,000, dated the 19th of December, 1906, in favour of Dalip Singh, stating the particulars of the moneys received by him from Dalip Singh.

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As the learned Judges of the High Court point out, save and except the third item in the receipt relating to a promissory note for Rs. 1,000, dated 30th March, 1904, executed by Harbans in favour of Dalip which, together with interest, amounted to Rs. 1,400, it showed no consideration of an antecedent character so as to make it binding on the sons. With reference to this part of the transaction the learned Judges say as follows:—

"What we are concerned with is the position of Dalip Singh, who deliberately took it upon himself to thrust himself into this matter by asserting his claim to pre-empt the sale. He, therefore, made himself liable for any legal consequences which might result from the fact that he was intermeddling with a sale contracted by a Hindu father who had minor sons living jointly with him. He handed over Rs. 2,000 to Harbans Singh in cash on December 19th, 1906. He arranged with certain other persons to pay Harbans Singh Rs. 5,000 more in cash and he gave Harbans Singh a mortgage of property of his own for Rs. 4,600, the consideration of which was set down as forming part of the Rs. 13,000 which he was bound to pay under the decree in the pre-emption suit. There remains only a small sum of Rs. 1,400 which was set off against an antecedent debt, that is to say, against money previously advanced by Dalip Singh to Harbans Singh, not on the security of any alienation of joint family property in the hands of the latter, but on a simple promissory note. The date of this promissory note was more than 2 1|2 years prior to the execution of the receipt of December 19th, 1906. There seems no reason to doubt that there was real disassociation in fact as well as in point of time between the two transactions."

It is contended that certain expressions used by their Lordships in the case of *Sahu Ram Chandra* v. *Bhup Singh*(1) that debts contracted by the father "in order to raise money to pay off an antecedent debt" support the view that in the present case the sale to Dalip Singh was to pay off an "antecedent debt," viz., the money due to Girwar Singh and his associates. In their Lordships' opinion the contention is wholly untenable; as the High Court point out, the debt to Girwar and others had already been paid off: and no portion of the Rs. 13,000 which Harbans Singh received from Dalip Singh was applied to its discharge.

The doctrine of "antecedent debt" has been carried far enough; if the present contention is acceded to, it would mean that a contract for a loan which never was completed, to pay off a previous debt otherwise discharged, would become "an antecedent debt." The contention is, on the face of it, absurd.

On the question of limitation their Lordships concur with the High Court. They are of opinion that there is no subs-

1. (1917) I L R 39 A 437: 44 I A 126: 33 M L J 14.

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tance in this appeal and that it should be dismissed; but without costs, as there is no appearance on behalf of the respondents, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *Hy. S. L. Polak.*

A. de M. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice.*

Seth Chand Mull Dudha, C. I. E. ... *Plaintiff**

*v.*

Purushothamdoss ... *Defendant.*

Seth Chand Mull Dudha v. Purushothamdoss.

*Civil Procedure Code, O. 38, R. 1—Arrest before judgment—Security for appearance—Order when to be passed—Principles guiding—Suit on foreign judgment—SpecialTribunal constituted by* firman *of the Nizam—Order to pay —If an executive order.*

Before exercising the powers conferred by O. 38, Civil Procedure Code, a Court should be satisfied on two points. The first is that the plaintiff's cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint. The second is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court.

A suit for a large sum of money was instituted on the Original Side of the High Court, the plaint being founded on the proceedings of a Special Tribunal created under a *firman* of the Nizam of Hyderabad and described as the decree of that Commission. The plaintiff applied under S. 94 (*a*) and O. 38, R. 1 of the Civil Procedure Code for arrest of the defendant before judgment. *Held,* in exercising its powers of ordering arrest, the Court must at least be satisfied that the plaint did not reveal on the face of it any matter obviously doubtful and arguable. As the allegations in the plaint showed that it was a highly arguable point whether the proceedings before the Special Tribunal terminated in anything that could be called a decree or foreign judgment within the meaning of S. 13, Civil Procedure Code, and as it was also arguable that the order to pay was not a judgment but an executive order, the Court should refuse to order arrest before judgment or direct the defendant to give security for appearance.

Ordinary Original Civil Jurisdiction.

*Nugent Grant* instructed by *N. T. Shamanna* for plaintiff.

*S. Varadachari* and *V. C. Gopalarathnam* for defendant.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENT:—This is an application under O. 38, R. 1, Civil Procedure Code, for arrest before judgment of the defendant and an order that he should be made to show cause

*C S No. 114 of 1926. 3rd March, 1926.

Seth Chand Mull Dudha *v.* Purushotham doss.

Coutts Trotter, C. J.

in compliance with S. 94 (*a*), Civil Procedure Code, why he should not give security for his appearance. At the close of the argument I intimated what I proposed to do in the matter but as it is one of considerable general importance I thought it best to state my reasons formally. The facts are shortly as follows: The suit was brought on the Original Side of this Court for a sum of very nearly 5 1|2 lakhs and it was founded upon what he described as "the decree dated 19th December, 1925, at Hyderabad, Deccan, of the Court of the Judicial Commissioner in the State of His Exalted Highness the Nizam of Hyderabad," that suit is not before me but will be tried in the ordinary course by a Judge sitting on the Original Side of this Court and I desire to say nothing that would in any way seem to anticipate that decision. But I am asked here to exercise a jurisdiction the effect of which might be to compel a man either to furnish security in a very large sum of money or possibly on his failure to do so to undergo imprisonment. I think it is desirable that I should state what are the principles which in my opinion should guide me in exercising that jurisdiction. It appears to me that before exercising the powers conferred by O. 38 a Court should be satisfied on two points. The first is that the plaintiff's cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint. The second is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. For the reasons which I am about to give I do not think it necessary for me to go into the second point in this case as I do not think that the plaintiff has succeeded in establishing his position on the first point The debt on which the Hyderabad proceedings were founded was incurred about 50 years ago before the present defendant was born, in any event before the year 1877, because in that year a suit of some sort was launched for this very debt against Hargopaldoss, the brother of the present defendant's grandfather. It appears to have been started in a tribunal called the Court of Bankers which ceased to exist before any conclusion was arrived at; and according to the plaintiff, the suit was then transferred to the High Court of Hyderabad which I take to be the ordinary and regular tribunal in that State for the disposal of civil cases. No final judgment was ever delivered in that Court because owing to some failure by the

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plaintiff to pay stamp-duties or fees in the regular course the High Court ordered the suit to be taken off its list of pending cases. This statement I take from the affidavit of the plaintiff himself. The defendant says that that order was passed as long ago as 1881, and his statement is uncontradicted. In March 1922 a petition was addressed by the plaintiff to His Exalted Highness the Nizam of Hyderabad and in response to that petition a *firman* was issued by His Exalted Highness appointing a special Commission to hear and report to him upon the claim and apparently some special directions were given in the *firman,* a complete copy of which has not been put before me, as to how the plea of limitation which, it was doubtless anticipated, the defendant would set up was to be dealt with. The Commissioners were two Judges of the High Court and a gentleman who is described as holding the office of Sadrul Maham which is translated as Head of the Department of Commerce and Industries. That tribunal issued a report a copy of which is before me furnished by the plaintiff. The Commissioners framed issues, heard evidence, and examined accounts. The wording of a portion of the *firman* is quoted to the effect that the suit is to be heard by the Commission "irrespective of limitation". The issue that was framed is this: "Is this case different from the case of Amersi Sejan Mal and Mahanand Ram Puran Mal (that is apparently the Original Suit in the Court of Bankers) and is it not covered by the *firman* and is it not exempt from limitation" with a note. "onus on the defendant?" The reason for framing this issue in this form appears to be as follows, that the plaintiff contended that the proceedings before the Commissioners were a mere continuation of the old suit that was filed before the defunct Court, the Court of Bankers, in 1877, and it was alleged that in that Court no question of limitation was ever entertained and no such plea was ever open to a defendant there.

I have not had put before me any information as to how the Courts of Ordinary Civil Jurisdiction in Hyderabad are constituted nor under what authority the ordinary law of limitation is in force as it undoubtedly appears to be in the Ordinary Civil Courts of the State. I have no information as to how far the prerogative of His Exalted Highness extends and I am not suggesting any doubts that His Exalted Highness was acting entirely within his constitutional powers in issuing the *firman* of 1923. So far as I can ascertain from perusing

the document, the proceedings of the Commission really amounted to what I should call a report to be laid before His Exalted Highness and I gather that the mandate to pay a sum of money issued to the defendant took the form of an order passed by His Exalted Highness in the amount reported by the Commissioners to be the sum in their opinion due. I may add that the principal debt was found by them to be a sum of about 2 3|4 lakhs and that interest at the rate which is alleged to have been originally agreed upon between the parties would, on a rough calculation, appear to amount to nearly 8 lakhs at simple interest and to the stupendous figure of about half a crore at compound. Such a conclusion obviously staggered the Commissioners and they cut down the interest to the exact sum of the principal, I do not know on what legal basis.

I have already said that I do not propose to say anything about the merits of this case but I think before I make an order under O. 38 I must at least be satisfied that the plaint does not reveal on the face of it any matter which is obviously doubtful and arguable. In my opinion this plaint discloses highly contentious matters. Assuming as I do for the purposes of this case that the acts of His Exalted Highness as a sovereign prince cannot be questioned in these Courts and that his subjects cannot be heard to say that any orders passed by him in relation to them are not binding upon them or that he has not power to take away any matter from the jurisdiction of the ordinary Courts, to be dealt with by himself or anybody appointed for the purpose by them, it nevertheless seems to me that there are two matters apparent on the face of this plaint which preclude me from exercising the jurisdiction conferred on me by O. 38. The plaint is founded on the proceedings of the Special Tribunal created under the *firman* and describes it as a decree of that Commission. As I have already pointed out, it is at least highly arguable that the proceedings before the Commissioners terminated not in anything that could be called a decree or a foreign judgment within the meaning of S. 13 of the Code of Civil Procedure but a report submitted to His Exalted Highness to guide him as to what action he should take. It is also obvious that it is highly arguable that the order to pay passed by His Exalted Highness, though binding on the defendant as a subject, is not a judgment but an executive Act. I pass no opinion as to whether those arguments are sound or

Seth Chand Mull Dudha v. Purushothamdoss.

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unsound but it appears to me that it would be wrong for me to subject this defendant to any process before he has had an opportunity of urging them. It is inapposite to speak in this case of safeguarding the liberty of the subject because the matter comes before me on the footing that the defendant is not a subject of His Majesty the King Emperor but of His Exalted Highness the Nizam. But at the same time when the jurisdiction of this Court is involved against a subject of a foreign State on the ground that by coming within the physical boundaries of the jurisdiction of this Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast upon me to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. I do not think it necessary to refer to the provisions of S. 13 of the Code of Civil Procedure except in so far as inferentially I may be taken to have founded myself on cl. (*a*) of that section as being a provision which it will be open to the defendant to invoke in his favour, and I do not feel called upon to pay any attention to the argument about natural justice which is referred to in cl. (*d*). It would obviously be grossly disrespectful of this Court to entertain any argument to the effect that an order passed by a sovereign power by virtue of its prerogative was opposed to natural justice: nor for the matter of that am I able to see how natural justice, whatever the expression may mean, can be said to include the right of a defendant to plead limitation, unless it is granted to him by a Statute acknowledged by the Sovereign Prince to be binding upon him and to limit by its terms the exercise of his prerogative. I may add that the impossibility of this Court taking upon itself to question the act of a Sovereign Prince on any such ground adds additional force to the defendant's contention that the act of His Exalted Highness was an executive act performed by him by virtue of his prerogative as a Sovereign Prince and not in any sense a judgment or a judicial decree. In conclusion, I wish to repeat once more that all these matters which I have discussed are ultimately matters for the Judge before whom the suit will come for trial, and that I need say no more than this: that they raise to my mind sufficient ground for my refusing to act in anticipation of that determination by that tribunal. The summons will be dismissed with defendant's taxed costs in any event.

T. S. V. *Summons dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS, AND MR. JUSTICE WALLACE.

Nori Venkatakrishnayya ... *Appellant** (*Petitioner-6th Defendant*)

*v.*

Kundurthi Byragi and others ... *Respondents* (*Respondents*)

Venkatakrishnayya *v.* Kundurthi Byragi.

*Hindu Law—Joint family—Father—Debts of—Son's liability for—Trustee—Moneys coming into hands of father as, and not accounted for by him—Son's liability to account for.*

Under the Hindu Law a person is liable to account for amounts collected by his father and grandfather in their capacity as trustees but subsequently misappropriated by them. The fact that the misappropriation amounts to a criminal offence does not affect his liability.

Where, therefore, all that appeared was that certain sums of money for which a Hindu father was accountable were not accounted for by him and in a scheme suit he was ordered to pay the amount which came into his hands, *held,* that his son was liable to account for such sums.

Appeal against the order of the Court of the Subordinate Judge of Bapatla in E. A. No. 1546 of 1921 in O. S. No. 87 of 1918.

*V. Ramadoss* for appellant.

*K. Kameswara Rao* for respondents.

The Court delivered the following

JUDGMENT:—The contention of Mr. Ramadoss in this appeal is that the debt incurred by the father was in the capacity of a trustee and therefore he must have been considered to have criminally misappropriated the trust funds and that the son's share cannot be made liable for such a debt.

There is nothing to show that the 1st defendant misappropriated any amount so as to bring him within the clutches of the Criminal Law and all that was found against him was that certain sums of money for which he was accountable were not accounted for by him and in a scheme suit he was ordered to pay the amount which came into his hands. We do not think that will amount to misappropriation or breach of trust within the meaning of S. 403 or 406 of the Indian Penal Code. If he had been found guilty of breach of trust he would have been removed from his office of trusteeship. But he has been allowed to continue. Therefore we cannot hold that he was guilty of breach of trust.

*A A O No. 365 of 1923. 30th November, 1925.

Venkatakrishnayya *v.* Kundurthi Byragi.

Even if it is found that he misappropriated the amount which came into his hands we do not think the sons can escape the liability to pay their father's debt. Mr. Ramadoss relied strongly upon *Durbar Khachar* v. *Khachar Harsur* (1). That case was considered by the learned Chief Justice and Mr Justice Seshagiri Aiyar in *Garuda Sanyasayya* v. *Nerella Murthenna* (2). There they held that "Under the Hindu Law a person was liable to account for amounts collected by his father and grandfather in their capacity as trustees but subsequently misappropriated by them. The fact that the misappropriation amounts to a criminal offence did not affect his liability." We are entirely in accord with the principle of this decision. Therefore we consider that there is nothing in this objection.

The next point raised is that the son, the appellant was specifically exonerated by the decree. The decree has not been produced before us. There is nothing to show that his share of the family property was exonerated. If there was anything in this point it would have been pressed before the learned Judges who remanded the suit for disposal on the merits.

No doubt this point was raised in the grounds of appeal but it evidently was not pressed. There are no materials before us for holding that the appellant's share was exonerated by the decree passed in the scheme suit.

The next question is one of fact. The contention of the appellant that he was divided from his father was disbelieved by the Lower Court. We have been taken through the evidence on his side and we find that the evidence is not only unsatisfactory but even if believed does not go to show that the property attached fell to the share of the appellant on partition. The evidence as to partition is very unsatisfactory and we have no reason to differ from the finding of the learned Judge which we consider to be correct.

The appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

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1. (1908) I L R 32 Bom 348.
2. (1918) 35 M L J 661.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

The Madura Hindu Permanent Fund, Limited, through its Secretary ... *Appellant** (*Appellant in S A No.* 1450 *of* 1921 *on the file in do.—Plaintiff*).

*v.*

Kamakshi Ammal and another ... *Respondents* (*Respondents in do.—Defendants*).

Madura Hindu Permanent Fund. Limited *v.* Kamakshi Ammal.

*Hindu Law—Will—Construction—Estate tail—Creation of—If legal—Indian Succession Act, S. 75—Principle of—Applicability—Hindu wills executed in the mofussil.*

The operative portion of the will of a Hindu recited, "The undermentioned house........shall after me, devolve absolutely on my natural father *P* and his male heirs. My aforesaid natural father and heirs shall maintain my adoptive mother *K* during her life and shall perform the obsequies to be done to her and to me; and the aforesaid *P* and his heirs shall get the house absolutely with right to alienate the same by gift, exchange, sale, etc." *Held,* on a construction of the will, (1) the words created an estate in tail in favour of male heirs and being an estate unknown to Hindu Law the bequests were not valid; (2) the will did not contain two distinct dispositions, but only one in favour of *P* and his male heirs, the second clause being only explanatory of the first and not contianing a disposition different from that contained in the first; (3) the expressions "aforesaid natural father and heirs" and "aforesaid *P* and his heirs" in the second clause did not in any way change the nature of the disposition or estate created by the previous clause, *Doe* v. *Fyldes,* 98 E R 1387 followed; and (4) the devise being to *P* and his male heirs, a Court of Law cannot construe the will as giving the property to *P* alone, since it would amount to creating a new will for the testator.

The principle contained in S. 75 of the Indian Succession Act, 1865, cannot be applied to the will of a Hindu executed in the mofussil.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Phillips passed in S. A. No. 1450 of 1921 preferred against the decree of the District Court of Madura in A S Nos. 260 and 263 of 1920 preferred against the decree of the Court of the Subordinate Judge of Madura, in O. S. No. 130 of 1918.

*K. V. Krishnaswamy Aiyar* and *K. Rajah Aiyar* for appellant.

*T. M. Krishnaswamy Aiyar* and *T. M. Ramaswamy Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—This appeal is against the judgment of our learned brother Phillips, J. and relates to the construction

*L P Appeal No. 74 of 1924. 13th November 1925.

Madura Hindu Permanent Fund, Limited *v.* Kamakshi Ammal.

of a will. The clause of the will to be construed reads as follows:—

"The undermentioned house.......and all the rights accruing thereunder, shall after me, devolve absolutely on my natural father Pichuvayyar and his male heirs. My aforesaid natural father and heirs shall maintain my adoptive mother Kamakshi Ammal during her life and shall perform the obsequies to be done to her and to me; and the aforesaid Pichuvayyar and his heirs shall get the undermentioned house belonging to me, absolutely with right to alienate the same by gift, exchange, sale, etc.".

It was held by Mr. Justice Phillips that the will created an estate unknown to Hindu Law and therefore the disposition was invalid.

The first contention of Mr. K. V. Krishnaswamy Aiyar for the appellant is, that there are two dispositions in the will and as they are inconsistent dispositions, they must be construed in such a way as not to give rise to an intestacy. The will does not contain two distinct dispositions but only one disposition in favour of the father and his male heirs in the first clause; and in the 2nd clause a condition is attached as to what should be done for the maintenance of the adoptive mother and for the performance of the funerals. The 2nd clause is only explanatory of the first and does not contain a disposition different from that contained in the first. In this view it is unnecessary to consider whether the principle of S. 75 of the Indian Succession Act should be applied to the case of a Hindu will. S. 75 has not been enacted in the Hindu Wills Act and even if the principle of S. 75 is to be applied to Hindu Wills, it cannot be applied to a will executed in the mofussil to which the Hindu Wills Act does not apply. It is unnecessary to consider this question further.

The real question is whether the words "My natural father Pichuvayyar and his male heirs" mean, Pichuvayyar and the male heirs in succession. The contention of Mr. K. V. Krishnaswamy Aiyar is, that the Tamil words" "என் ஜனகபிதா, பிச்சுவய்யர் அவர்களும் அவருடைய ஆண் வார்சுகளும்" should not be translated as 'My father Pichuvayyar and his heirs male.' But the correct translation of 'ஆண் வார்சுகள்.' is only 'male heirs' and when a person bequeaths property to some one and his male heirs, he means that the property should devolve upon the legatee and the male heirs in succession. The words therefore create an estate-in-tail in favour of male heirs and according to the principle laid down in the well known Tagore case, such an estate is unknown to Hindu Law, and such bequests cannot therefore be valid.

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The next contention of Mr. K. V. Krishnaswamy Aiyar is that the first clause of the will should be interpreted in the light of the second clause. In the first clause the words are "My natural father and his male heirs" and in the second, the words are "My aforesaid natural father and heirs" and lower down "aforesaid Pichuvayyar and his heirs." Strong reliance is placed on the expression "Pichuvayyar and his heirs" and it is said that the testator meant to depose the property to "Pichuvayyar and his heirs." This argument overlooks the use of the expression "aforesaid." When a person devises property to a certain person and certain heirs and when he lower down, instead of repeating the expression uses the expression " aforesaid person and his heirs" it cannot be said that he intended to change the course of the devolution of the property already provided for in the preceding clause of the will. The observation of Lord Mansfield in *Doe* v. *Fyldes* (1) apply to this case. The learned Lord observes: "If the word 'heirs' is so used in the first place it must be so used in the several other places that follow. Nothing is to be implied from the additional words "for ever" because that expression is repeated by the testatrix in the devise of each of the estates tail. The nature of the provision affords a strong argument that she did not mean to change the sense of the word 'heirs' in this part of the will and to give a fee simple." In that case the testatrix bequeathed her property to her eldest daughter Alice Scolefield and the heirs of her body lawfully to be begotten, for ever and in the latter portion of the will repeated the expression 'the heirs of Alice Scolefield' three times in the will. The question was "whether the words 'the heirs of Alice Scolefield' thrice repeated relative to the redemption of the term vested in the executors shall be construed to refer to the special designation of the heirs, to whom the estate is devised in the beginning of the will; or to introduce a new and more general denomination of heirs, and to amount to a revocation of the expression 'estate-tail' given in the beginning of the will." Lord Mansfield held that the expression "heirs of Alice Scolefield" though thrice repeated, did not create a fresh bequest in favour of the heirs of Alice Scolefield but left the bequest in favour of "Alice Scolefield and the heirs of her body to be lawfully begotten" unaffetced. In this case the testator devises the property to his "father and his male heirs" and in a

1. (1778) 2 Cowper 833: 98 E R 1387.

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later clause uses the expression "father and his heirs". It cannot be said that the later clause has in any way changed the nature of the disposition or the nature of the estate created in the previous clause. Mr. K. V. Krishnaswami Aiyar tried to get over the aforesaid decision of Lord Mansfield in *Doe v. Fyldes* (1) by contending that none of the text-books except Jarman on Wills, gives any reference to this case. But we find that this case was referred to as an authority though on another point by Crompton, J. in *Good v. Good* (2).

It is next contended by Mr. K. V. Krishnaswami Aiyar that if the bequest in favour of heirs even if held to be bad the bequest in favour of the father should be held to be good. This contention is against the principle of the decision in the *Tagore case*. When a testator devises property to his father and his male heirs, the Court is not justified in creating a new will for the testator by giving the property absolutely to the father and overlooking the intention of the testator to bequeath the property to "father and his male heirs". This is not a case where Pichuvayyar is given a life-estate and the remainder over to the male heirs. The bequest is to the father and the male heirs. The Court would not be justified in treating the bequest as one to the father alone. The judgment appealed against is right. We therefore dismiss the appeal with costs.

T. S. V. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, KT. *Chief Justice*, MR. JUSTICE KRISHNAN, AND MR JUSTICE BEASLEY.

S. Hari Rao ... *Appellant** (*Insolvent*)

*v.*

The Official Assignee, High Court, Madras and others ... *Respondents.*

F. B.

Hari Rao v. Official Assignee, High Court, Madras.

*Insolvency—Sale of property by Official Assignee—Order confirming sale—Appeal by insolvent—If lies—Interest of insolvent.*

An insolvent has no right of appeal against an order of the Insolvency Court confirming a sale of his property by the Official Assignee. On adjudication his whole estate vests in the Official Assignee and as he has no legal

*O S Appeal No. 47 of 1924. 18th January, 1926.

1. (1778) 2 Cowper 833: 98 E R 1387.
2. (1857) 119 E R 1256 : E B 296.

interest in the estate, he cannot be treated as aggrieved by the order confirming the sale. *Ex parte Sheffield*, 10 Ch D 434; *In re Leadbeater*, 10 Ch D 388; *Sakhawat Ali* v. *Radha Mohan*, I L R 41 A 243 followed.

F. B — Hari Rao *v.* Official Assignee, High Court, Madras.

On Appeal from the order of the Hon'ble Mr. Justice Waller dated 4th March, 1924 passed in the exercies of its Ordinary Original Insolvency Jurisdiction of the High Court in Insolvency Petition No. 218 of 1922.

The Court made the following order of reference to a Full Bench

*The Chief Justice* and *Viswanadha Sastri, J.*:—We refer the following question to a Full Bench:—"Whether the decision in *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) is correct or whether the decision in *Sakhawat Ali* v. *Radha Mohan* (2) should be followed."

*P. R. Srinivasa Aiyangar*, Advocate and *A. Rajagopala Aiyangar* for appellant.

*M. S. Venkatrama Aiyar* for respondents 2 and 4.

The Court delivered the following

JUDGMENTS:—*The Chief Justice*:—The question raised here is whether the insolvent has a right of appeal against an order confirming a sale of part of the estate which was originally his and subsequently vested in the Official Assignee, an order which he sought to oppose. The matter was referred to a Full Bench in view of what were represented to be the directly conflicting decision of this Court in *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) and of the Allahabad High Court in *Sakhawat Ali* v. *Radha Mohan* (2). We observe that the English decisions on the subject were not cited so far as appears from the report to the Madras Court. We have examined those decisions and come to the conclusion that they ought to be followed.

Coutts Trotter, J.

The only ground on which the Insolvent's right to appeal can be based is that he is a person aggrieved because, his estate having vested in the Official Assignee, he is nevertheless entitled to say that, if all the claims of the creditors who had proved were set aside or discharged by payment, he would have an interest in the surplus which might be left over. The leading English cases, *Ex parte Sheffield* (3) and *In re Leadbeater* (4) have disposed of this contention on grounds which, we think, are unanswerable. The insolvent has no legal interest

1. (1923) 45 M L J 166.
2. (1918) I L R 41 All 243.
3. (1879) 10 Ch. D 434.
4. (1878) 10 Ch D 388.

F. B.

Hari Rao v. Official Assignee, High Court, Madras.

Coutts Trotter, J.

but has merely a hope or expectation and, as James, L. J., pointed out, the mischief of allowing a bankrupt on the contingent chance of his ultimately acquiring title to some surplus which might never be realised to interfere with and embarrass the administration of the estate would be immeasurable. We are therefore of opinion that the insolvent has no right of appeal which will therefore stand dismissed. The question referred to us was perhaps not rightly framed, and I say so with the more freedom because I drafted it myself. I have had the advantage of perusing the judgment about to be delivered by Krishnan, J., and I agree that we can follow the ruling in *Sakhawat Ali* v. *Radha Mohan* (2) without the necessity of saying that *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) was wrongly decided. The right claimed by the insolvent in the latter case was to object to a creditor's proof and that is not directly before us.

*Beasley, J.*:—I concur.

Krishnan, J.

*Krishnan, J.*:—I agree with the learned Chief Justice that we should follow the view expressed in *Sakhawat Ali* v. *Radha Mohan* (2), which is in accordance with the view taken in the English cases cited to us *Ex parte Sheffield* (3) and *In re Leadbeater* (4). As pointed out in those rulings the insolvent has after adjudication no legal interest in his estate which has vested in the Official Assignee; and he has therefore no legal right to interfere in the realisation of that estate and he cannot be treated as aggrieved by any order passed in the course of such realisation. It is true that if any surplus remains after the creditors are paid in full such amount will be paid over to the insolvent and it is also true that if a certain proportion of his debt is paid from his assets he will be entitled to a discharge. But these are merely expectations as pointed out in the English cases which may or may not be realised. They do not give any legal right to the insolvent to interfere in the realisation of his property which is entirely left to the Official Assignee. The reasoning to the contrary in the judgment of Oldfield, J., in *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) cannot be supported. That case itself was however one of an appeal by the insolvent against an order admitting proof of a creditor to which he had objected. The question whether the insolvent is a person aggrieved in such

1. (1923) 45 M L J 166. 2. (1918) I L R 41 A 243.
3. (1879) 10 Ch D 434. 4. (1878) 10 Ch D 388.

F. B.

Hari Rao *v.* Official Assignee, High Court, Madras.

Krishnan, J.

cumstances does not arise in the present case and I express no opinion on the point.

I would answer the reference by saying that the ruling in *Sakhawat Ali* v. *Radha Mohan* (2) should be followed and that no appeal lies in the present case, and I agree in dismissing the appeal.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Kt. Chief Justice,* AND MR. JUSTICE RAMESAM.

The Official Assignee of Madras ... *Appellant** (*Respondent 1st defendant*)

*v.*

A. Ramalingappa and another ... *Respondents* (*Applicants 5th and 6th defendants*).

Official Assignee of Madras *v.* Ramalingappa.

*Letters Patent (Madras), cl. 15—Judgment—What is—Order transposing certain defendants as plaintiffs—If appealable.*

An order passed in a suit pending on the Original Side of the High Court transposing certain defendants as plaintiffs does not amount to a judgment within the meaning of cl. 15 of the Letters Patent and is not appealable. *Tuljaram Rao* v. *Alagappa Chettiar,* I L R 35 M 1 applied.

*Per the Chief Justice:*—A determination, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards certain parties or *in toto* is a judgment and is appealable; but, if it leaves the suit free to go on, it is not a judgment.

*Per Ramesam, J.:*—Every order on a contested petition is not a judgment.

On Appeal against the interlocutory order made on the 15th September, 1925 by the Hon'ble Mr. Justice Srinivasa Aiyangar in the exercise of the ordinary Original Civil Jurisdiction of the High Court, on an application in C. S. No. 395 of 1922.

*K. S. Narayana Aiyangar* for *Messrs. Grant* and *Greatorex* for appellant.

*K. Rajah Aiyar* and *V. Ramaswami Aiyar* for respondents.

The Court delivered the following

Coutts Trotter C. J.

JUDGMENTS:—*The Chief Justice:*—The preliminary point is taken in this case that no appeal lies because the pronouncement appealed against was not a judgment but an order. The words have been the subject of great controversy in these Courts and I certainly do not propose to attempt to go through

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*O S Appeal No. 108 of 1925. 16th December, 1925.

2. (1918) I L R 41 All 243.

Official Assignee of Madras v Ramalingappa.

Coutts Trotter, C J.

the welter of conflicting decisions, with many of which I may say I do not in the least agree. It seems to me that the matter is left in a state in which all this Court can do is to take the principle underlying the Full Bench case in *Tuljaram Rao* v. *Alagappa Chettiar* (1) and apply it as best as it can to the actual matter before it. In this case the learned Judge directed that certain persons who appeared in the first instance on the record as defendants should be added as plaintiffs, the 2nd plaintiff having given up his cause of action and thereby adversely no doubt affected the position of the defendants who were transposed, because, if he obtained a decree, in the working out of that decree they might have their rights affected. However, that is a question on the merits which really does not arise. The learned Chief Justice, Sir Arnold White laid down the following test in the case cited above, *Tuljaram Rao* v. *Alagappa Chettiar* (1) and, If I may respectfully say so, I think he very wisely guarded himself from setting up a too *Procrustean* bed in the language that he adopted in laying down the principle for Courts to work out on the facts of each case, he says: "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.'"

Then later on he says this and I respectfully agree with it.

"I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding."

Applying that and endeavouring as best as I can to see what is its true application, I think it is this, that a determination call it what you will, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards the particular people or *in toto*, is a judgment and is appealable; but, if the pronouncement leaves the

1. (1910) I L R 35 M 1: 21 M L J 1.

Official Assignee of Madras v. Ramalingappa.

Coutts Trotter, C. J.

suit free to go on, then it is not a judgment within the meaning of the clause. In my opinion a distinction may be drawn which unfortunately has not been between the grant and the refusal of leave to sue. It seems to me that it may well be said that refusing leave to sue is a final determination of the matter against the proposed plaintiff. Similarly in a case where a Court held that it had no jurisdiction to entertain the suit I make no doubt that these Courts would accept that in accordance with the decision in *Tuljaram Rao* v. *Alagappa Chettiar* (1) being a final determination. But it seems to me that, if the effect of the order is to allow the proceedings to go on, it is impossible to say that it satisfies the test laid down by Sir Arnold White in the Full Bench case. I do not desire to multiply illustrations, because it is much better to leave these things to be dealt with as they arise. I have therefore contended myself with what appears to me to be a reasonably clear illustration one way or the other. Looking at this order, its effect was to allow the suit to go on for determination on the merits and I am utterly unable to see that the order of transference of these persons from the position of the defendants to that of plaintiffs was in any way a decision the effect of which was to put an end to the suit or proceeding. In my opinion, therefore, without attempting to lay down any different test to that laid down by my learned predecessor in *Tuljaram Rao* v. *Alagappa Chettiar* (1), I think it is not a case which is on the line. It is a case where any person applying ordinary language would without hesitation say that this was an order and not a judgment. I am therefore of opinion that no appeal lies and that this appeal must be dismissed with costs.

Ramesam, J.

*Ramesam, J.*:—I agree. The state of the case law has been aptly described by my Lord and, having regard to it I will not attempt any definition of the word 'judgment'. I will only say this, that I am not prepared to say that every order on a contested petition is a judgment. The line dividing judgments from orders must be drawn somewhere short of this. Having regard to the fact that in the case before us no substantial right of the defendants has been adversely affected by the order under appeal, I would say that it does not fall on the judgment side of the line. Beyond this I make no further attempt.

T. S. V. *Appeal dismissed.*

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1. (1910) I L R 35 M 1: 21 M L J 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

T. Venkatasubba Mudali ... *Appellant** (*Defts.* 1 *and* 2)

*v.*

Manickammal and another ... *Respondents* (*2nd respondent and 3rd defendant*).

Venkatasubba Mudali *v.* Manickammal.

*Execution of decree—Plea in bar of—Pre-decree arrangement between judgment-debtor and decree-holder that the decree was not to be executed if a good.*

It is open to a judgment-debtor to plead in bar of execution of a decree against him a pre-decree arrangement between him and the decree-holder that the decree was not to be executed.

Appeal against the order of the District Court of Chingleput dated 6th April, 1925, in E. P. No. 45 of 1924 in O. S. No. 21 of 1920.

*K. Bhashyam Aiyangar* for appellant.

*T. R. Ramachandra Aiyar* and *S. R. Dikshit* for respondents.

The Court delivered the following

Wallace, J.

JUDGMENTS:—*Wallace, J.*:—The point for decision is whether it is open to a judgment debtor to plead in bar of execution of a decree against him a predecree arrangement that the decree was not to be executed. The Lower Court has held that it was not so open to him, relying on three decisions of this Court, which in my view, so far as they may be used to support his view, run counter to the general trend of decisions in this Court. The most important decision on this point is the Full Bench case in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1). The question referred to the Full Bench there was whether a predecree arrangement to postpone the execution of a decree *for a certain time* can be pleaded as a bar to immediate execution. Two learned Judges of the Full Bench held that it could, and another learned Judge differed. The former based their decisions on the principle *stare decisis*, the previous cases relied on by them and on which they elected to stand being *Rama Aiyan* v. *Srinivasa Pattar* (2), *Rukmani Ammal* v. *Krishnamachariar* (3); *Krishnamachariar* v. *Rukmani Ammal* (4) and *Subramania Pillai* v.

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*C M A No. 270 of 1925. 7th December, 1925.

1. (1916) I L R 40 M 233: 32 M L J 13.

2. (1895) I L R 19 M 230: 5 M L J 218.

3. (1911) 9 M L T 464.

4. (1905) 15 M L J 370.

Venkatasubba Mudali v. Manickammal.

Wallace, J.

*Kumaravelu Ambalam* (5). Now, curiously enough, it was not noticed and has been overlooked also in other judgments on this matter that *Rama Aiyan* v. *Srinivasa Pattar* (2) is not really in point. The agreement in that case was post decree and not pre-decree. The other three cases lay down in general terms the principle that a pre-decree arrangement that a decree, when obtained, should not be executed can be pleaded in bar of execution. The *Rukmani Ammal* v. *Krishnamachariar* (3) and *Subramania Pillai* v. *Kumaravelu Ambalam* (5) follow the Full Bench rulings in *Laldas* v. *Kishordas* (6). No previous authority was quoted in the *Krishnamachariar* v. *Rukmani Ammal* (4). It is clear that these cases lay down a principle wider than the principle raised in the question referred to the Full Bench. In the Full Bench case the question was whether a pre-decree arrangement for a temporary postponement of execution can be pleaded; while in the three cases above-quoted, the general principle was that a pre-decree arrangement not to execute at all can be pleaded. The concurring judgment in the Full Bench proceeded however on the footing that this general principle adopted furnishes the answer to the question raised, although it is not necessary for the decision to go so far as the three cases above quoted. I have no doubt that the concurring Judges did intend to take their stand on the wider principle enunciated in these cases, and that they meant to uphold and confirm that principle and lay down that this Court in doing so was proceeding on the principle of *stare decisis*.

Subsequently to *Chidambaram Chettiar* v. *Krishna Vathiar* (1) there have been two divergent lines of decisions. One follows the general principle already stated for example *Sambasiva Aiyar* v. *Thirumalairamanujathathachariar* (7), in which it is adopted in the clearest terms as inherent in and flowing from the Full Bench decision and *Veluthevan* v. *Krishnaswami Reddi* (8), to which one of us was a party. The other set of cases springs from the ruling in *Arumugam Pillai* v. *Krishnaswami Naidu* (9), but before that is considered, reference may be made to the case in *Singa Raja* v. *Pethu Raja* (10). That case turned on a rather

1. (1916), I L R 40 M 233: 32 M L J 13.
2. (1895) I L R 19 M 230: 5 M L J 218.
3. (1911) 9 M L T 464.
4. (1905) 15 M L J 370.
5. (1916) I L R 39 M 541.
6. (1896) I L R 22 Bom 463.
7. (1918) 37 M L J 356.
8. (1924) 48 M L J 277.
9. (1920) I L R 43 M 725: 39 M L J 222.
10. (1918) 35 M L J 579.

Venkatasubba Mudali *v.* Manickammal.

Wallace, J.

strict interpretation of O.34 and not on this general principle, and no reference was made either to *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) or *Arumugam Pillai* v. *Krishnaswami Naidu* (9). In *Arumugam Pillai* v. *Krishnaswami Naidu* (9), which was decided in 1920, one learned Judge held that *Chidamabram Chettiar* v. *Krishna Vathiyar* (1) "does not oblige us to extend the principle to the extent required by the appellant's contention." I would point out that the one case referred to by the learned Judge, Oldfield, J., as the only case appearing in the authorised reports supporting the appellant's contentions before him is *Rama Ayyan* v. *Srinivasa Pattar* (2), which as I have observed, has no application to a pre-decree arrangement while the learned Judge has overlooked *Subramania Pillai* v. *Kumaravelu Ambalam* (5).

Next comes, the case in *Mallayya* v. *Chinna Kottayya* (11) which really seems to me hardly in point. It was a case of a *pre-suit*, and not of a *pre-decree* arrangement, which the learned Judges held could and should have been pleaded as an absolute defence to the suit. This was sufficient for the disposal of the case but the learned Judges went on to consider the general question of the right of a party to plead a pre-decree arrangement in bar of executions, and referred to the cases already quoted. The Full Bench case is put aside on the ground set out in *Arumugam Pillai* v. *Krishnaswami Naidu* (9); but it is quoted at the end of the judgment as supporting the plea that the agreement in that suit could not be pleaded in bar of execution. It is clearly a case distinguishable from *Chidambaram Chettiar* v. *Krishna Vathiyar* (1). The next case is *Ramanathan Chettiar* v. *Venkatachalam* (12) passed in 1923 which was decided on the ground that the agreement there pleaded was more similar to the one in *Arumugam Pillai* v. *Krishnaswami Naidu* (9) than to that in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1).

In this divergence of authority I think we are bound to follow the Full Bench ruling which does undoubtedly adopt and follow the general principle laid down in *Rukmani Ammal Krishnamachariar* (3), *Krishnamachariar* v. *Rukmani Ammal* (4) and *Subramania Pillai* v. *Kumaravelu Amba-*

1. (1916) I L R 40 M 233: 32 M L J 13.
2. (1895) I L R 19 M 230: 5 M L J 218.
3. (1911) 9 M L T 464. 4. (1905) 15 M L J 370.
5. (1916) I L R 39 M 541.
9. (1920) I L R 43 M 725: 39 M L J 222.
11. (1921) 14 L W 317. 12. (1923) 44 M L J 599.

*lam* (5) and hold to the principle which has been followed since 1903 until it was doubted in *Arumugam Pillai* v. *Krishnaswami Naidu* (9). It is essential that in such matters, there should be uniformity of procedure, and I see no reason to refer the case again to a Full Bench as we have been requested to do.

Venkatasubba Mudali *v.* Manickammal.

Wllace, J.

We must therefore reverse the decision of the District Judge and direct him to rehear the case. Costs up to date will abide the result.

Madhavan Nair, J.

*Madhavan Nair, J.*:—I concur with my learned brother throughout in his judgment. I have not been convinced by the arguments of Mr. T. R. Ramachandra Aiyar that the decision in *Veluthevan* v. *Krishnaswami Reddi* (8) to which I was a party does not lay down the correct law. It was held in that case that a judgment-debtor could plead in bar of an execution a pre-decree arrangement between him and the decree-holder that the decree should not be executed. That decision was based upon the Full Bench ruling in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1). The decision in *Krishnamachariar* v. *Rukmani Ammal* (4), *Rukmani Ammal* v. *Krishnamachariar* (3) and *Subramania Pillai* v. *Kumaravelu Ambalam* (5), which lay down the general principle that an arrangement prior to a decree not to execute the decree at all can be pleaded in bar of an execution furnished the ground for the decision in the Full Bench case. These cases laid down a principle wider than the one raised in the question referred to the Full Bench. There can be no doubt that the learned Judges who decided the case in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) accepted the principle of these three cases as correct law. The decision mainly relied upon by Mr. T. R. Ramachandra Aiyar in *Arumugam Pillai* v. *Krishnaswami Naidu* (9) as pointed out by my learned brother, refers to *Rama Ayyan* v. *Srinivasa Pattar* (2) which has no application to a pre-decree arrangement and overlooks the decision in *Subramania Pillai* v. *Kumaravelu Ambalam* (5), and apparently brushes aside the decisions mainly relied upon in the Full Bench case on the ground that they do not appear in the authorised reports. The other decisions quoted for the respondent, namely, *Singa*

1. (1916) I L R 40 M 233: 32 M L J 13.
2. (1895) I L R 19 M 230: 5 M L J 218.
3. (1911) 9 M L T 464.
4. (1905) 15 M L J 370.
5. (1916) I L R 39 M 541.
8. (1924) 48 M L J 277.
9. (1920) I L R 43 M 725: 39 M L J 222.

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*Raja* v. *Pethu Raja* (10), *Mallayya* v. *Chinna Kottayya* (11) and *Ramanathan Chettiar* v. *Venkatachalam* (12) do not advance his contentions in any appreciable degree.

In this state of authorities I agree with my learned brother that we are bound to follow the Full Bench ruling, and reverse the decision of the District Judge and request him to re-hear the case. The costs up to date will abide the result.

A. S. V. *Appeal reversed and remanded for rehearing.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN.

Arunachala Naicker ... *Petitioner** (*Petitioner*)

*v.*

C. K. Venkatachari and another ... *Respondents* (*Respondents*).

Arunachala Naicker v. Venkatachari.

*Madras Local Boards Act, R 4, cl. (3) of Rules framed under—District Munsif if subordinate to Subordinate Judge—Election petition filed in Sub-Court—Transmission for trial of, to District Munsif—Validity of.*

Acting under R. 4, cl. (3) of the Rules framed under the Madras Local Boards Act, the Subordinate Judge transmitted for trial an election petition filed in his Court against the election of the President of a Union Board to the Court of the District Munsif.

*Held,* that as the Court of the District Munsif could not be treated as a Court subordinate to the Court of the Subordinate Judge, the Subordinate Judge was not entitled to send the petition to the District Munsif.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order, dated 12th October, 1925, of the Court of the District Munsif of Maduranthakam at Chingleput in M. P. No. 454 of 1925 in O. P. No. 5 of 1925.

*K. Rajah Aiyar* for appellants.

*K. Bhashyam Aiyangar* and *V. C. Veeraraghavachariar* for respondents.

The Court delivered the following

JUDGMENT:—This petition refers to an election petition which had been filed in the Court of the Subordinate Judge of Chingleput against the election of the President of the Union Board of Uttaranallur. The Subordinate Judge apparently acting under R. 4, cl. (3) of the Rules framed under the Madras Local Boards Act transmitted the case to the Court of the District Munsif of Maduranthakam. The District

*C R P No. 872 of 1925. 9th December, 1925.

10. (1918) 35 M L J 579. 11. (1921) 14 L W 317.

12. (1923) 44 M L J 599.

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Munsif seems to have realised that the procedure was not justifiable as his Court could not be treated as a Court of Subordinate to the Subordinate Judge under R. 4, cl. (3) and the matter was represented to the Subordinate Judge. But the Subordinate Judge decided that he had power to transmit the case to the District Munsif and to get him to try it. This revision petition is against the order of the District Munsif proceeding to try the case under the orders of the Subordinate Judge.

It seems to me that the order of the Subordinate Judge sending the case to the District Munsif is not correct. That order is not supported before me by the respondent's vakil. The Court of the District Munsif of Maduranthakam cannot be treated as a Court subordinate to the Court of the Subordinate Judge of Chingleput as no appeals lie from that Court to the Subordinate Judge, but appeals lie to the District Court only. In the Civil Courts Act the District Munsifs are not treated as subordinates to the Subordinate Judges. That being so, it is not possible to hold that the District Munsif's Court was a Court to which the Subordinate Judge was entitled to send this petition. The Subordinate Judge himself should have tried the matter.

I therefore set aside all the order passed in this case and direct the Subordinate Judge to dispose of the election petition at an early date. Costs of this revision petition will be costs in the election petition.

A. S. V. *Reversed and remanded.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Sagi Venkatasubbayya ... *Appellant* (Plaintiff)*

*v.*

Sagi Kotamma and others ... *Respondents (Defendants 2 to 13 and 15 to 51).*

Venkatasubbayya v. Kotamma.

*Hindu Law—Compromise of doubtful claim—Validity—Mother-in-law putting forward claim of daughter-in-law to a share of family property—Father surrendering substantial portion of family property to mother-in-law as a sort of bribe to her to keep quiet and not a stir up litigation by daughter-in-law validity of surrender against son—Son's suit to set recover property surrendered—Decree in—Surrender if can be upheld to extent father's share.*

The first defendant, the husband of *D*-2, and one *A* were members of a Hindu family. The husband of the second defendant died leaving the second

*S A No. 476 of 1923. 12th October, 1925.

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defendant, his widow, and two daughters, but no male issue. After his death, the second defendant adopted *A*, who himself died leaving a widow, *S*, but no male issue. In 1911, the first defendant executed Ex. I in favour of the second defendant giving her a portion of the family properties. The suit was by the plaintiff, the son of the first defendant, to set aside Ex. I and to recover possession of the properties thereby conveyed to the second defendant. The questions for decision were (1) whether Ex. I was wholly binding upon the plaintiff as a *bona fide* settlement of a doubtful claim, and (2) if it was not, whether it should be set aside entirely or only so far as regards the moiety of the property conveyed thereby to which the plaintiff was entitled, in other words, whether Ex. I was binding upon the pliantiff to the extent of the first defendant's share in the said property.

It was found that in 1911 the family of the parties was in fact undivided, but that the question whether the husband of the second defendant died undivided or not was not then free from doubt and that the 2nd defendant at that time set up a case that her husband died divided, that the 1st defendant and the plaintiff were not entitled to more than a half-share of the family property, and that *S*, the widow of *A*, was entitled to the other half. It was further found that that claim was put forward by the second defendant behind the back of *S*, and that *S* herself neither put forward any such claim nor was aware of its being put forward by her mother-in-law. It was also found that what happened in connection with the execution of Ex. I was really that the first defendant closed the mouth of the second defendant by bribing her by executing Ex. I behind the back of *S* whose name was used by the second defendant to threaten the first defendant and to induce him to execute Ex. I as a price of peace. *S* derived no benefit under Ex. I.

*Held*, that Ex. I did not come within the scope of the rule of law which protected *bona fide* family settlements in compromise of doubtful claims or disputes and that it could not be upheld against the plaintiff as a *bone fide* settlement of a doubtful claim.

*Held further*, that Ex. I was however binding to the extent of the first defendant's share in the property surrendered thereby and that the plaintiff was entitled to recover only one-half of the property thereby conveyed.

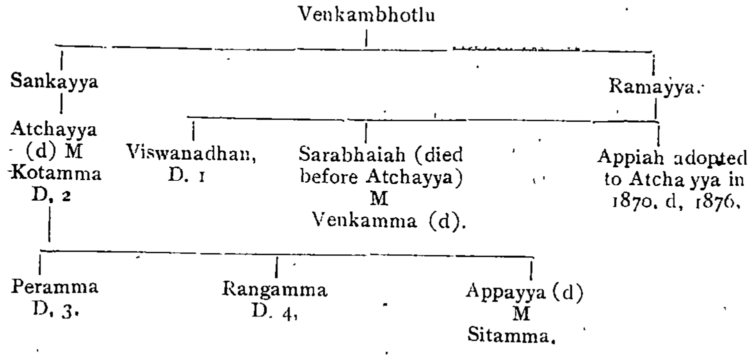
Second appeal against the decree of the District Court of Guntur in A. S. No. 223 of 1921 preferred against the decree of the Court of the Second Additional Subordinate Judge of Guntur in O. S. No. 25 of 1920.

*T. V. Ramanatha Aiyar* for appellant.

*Ch. Raghava Rao* for respondents.

The Court delivered the following

JUDGMENT:—The facts of this second appeal may be briefly stated as follows: The following pedigree shows the relationship of the parties:—




When Atchayya died in 1867 he left his widow Kotamma (2nd defendant) and two daughters, the 3rd and 4th defendants. In 1870 the widow Kotamma adopted Appiah the youngest brother of 1st defendant. This Appiah died in 1876 leaving a widow Sitamma. The family possessed about 160 acres of land. Sitamma was allotted 16 acres of land in Miriyala for her maintenance. The 2nd defendant was also given a definite plot of 18 acres and 17 cents. in Voppicherla village for her life (as admitted by her in her deposition) for her maintenance. (*Vide* paragraph 4 of the District Judge's judgment where the plaintiff's version on this point was found true). According to the finding of the Courts below when Atchayya died the family was undivided. This is a finding of fact which I must accept and which has not been questioned before me. But for some reason the names of the 2nd defendant and her daughter-in-law Sitamma were also entered in the patta relating to the family lands along with that of the 1st defendant. In 1908, Ex. V, dated 18th July, 1908, was executed by the 1st and 2nd defendants in favour of a stranger in which they agreed to sell one of the family lands, obviously the vendee insisted on the 2nd defendant joining in the agreement because the patta stood in her name also. A suit for specific performance of this agreement was filed in the District Munsif's Court of Narasaraopet (O. S. No. 580 of 1911). The present defendants 1 and 2 were also defendants 1 and 2 in that suit and Ex. V was then Ex. B. The 1st defendant did not contest the suit but the 2nd defendant stated that she was willing to carry out the terms of the agreement if half of the sale price was paid to her. If the family was undivided the property wholly belonged to the 1st defendant and the 2nd defendant was not entitled to any portion of the consideration. Apparently, taking advantage of the fact that she was also a party to the

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agreement she put forward a claim for half of the consideration and thus obstructed the completion of that transaction. The District Munsif dismissed the suit on the 26th August, 1911. The same pleader appeared for the 1st and 2nd defendants. Within three months after the dismissal of the suit, that is, on 16th November, 1911, the 1st defendant executed Ex. I in favour of the 2nd defendant giving 48 acres of land including the 18 acres 17 cents already allotted. Two days before the execution of Ex. I the land in respect of which the agreement was executed and the suit for specific performance was filed was sold to the vendee under Ex. VI, dated 14th November, 1911, and on the same date as the sale deed (Ex. I), Ex. VII was executed by the 2nd defendant in favour of the 1st defendant by which the patta was agreed to be transferred entirely in favour of the 1st defendant. The District Judge has found that these three documents I, VI and VII came into existence and were executed at the same time, by which he apparently meant to say that they are all parts of one transaction. I agree. The District Judge also found that at that time the question whether Atchayya died undivided or not was not free from doubt though now a finding is given that he died undivided. Though the undivided status of the family at the time of Atchayya's death must have been known to all the parties concerned still it is also clear that, in 1911, if the 2nd defendant and her daughter-in-law Sitamma chose to dispute it, the 1st defendant was not in a position to establish the joint status beyond all doubt. This is what the District Judge must have meant when he said "The question as regards the status of Atchayya was not however free from doubt." The District Judge finally winds up paragraph 9 of his judgment by saying: "Those two namely (1) giving up her right to half the sale proceeds, and (2) admitting that Atchayya was joint with the 1st defendant, formed the consideration for the execution of Ex. I in her favour." (He had previously found all the other pleas of the 2nd defendant as the motive for Ex. I not true). The second part of the sentence I accept unreservedly, that is, I have no doubt that, in 1911, the 2nd defendant set up a case that her husband Atchayya died divided and therefore the 1st defendant and his adopted son the plaintiff were not entitled to more than a half share of the family property. So far I am of opinion that the view taken by the Lower Court is correct. But what does this amount to? If the family was not undivided but was divided, when Atchayya died the property would

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descend to his adopted son Appiah and, when he died in 1876, the half share would descend to his widow Sitamma and Sitamma would be entitled to a half share of the whole of the family property in 1911 and 2nd defendant would still be a maintenance holder out of the half share. So that the dispute raised by the 2nd defendant in 1911 amounts to putting forward the title of Sitamma to half of the share in the property and not to put forward a claim in her own behalf; for, I do not think in 1911 there would have been anybody so ignorant of Hindu Law in the country that one could plausibly suggest that the mother of a last male owner was entitled to succeed in preference to the widow. If there is any foolish person who could put forward such a claim there is no foolish person who can admit such a claim. So that, what happened in 1911 was this. Kotamma threatened the 1st defendant by putting forward the case that Atchayya died divided and therefore her daughter-in-law Sitamma was entitled to half the property, not that she was herself entitled to any portion of the property. This was done behind the back of Sitamma. If this is the claim that was put forward in 1911 she could not have put forward any title to half of the sale proceeds of the land agreed to be sold in 1908. Any claim to the sale proceeds on the ground that her name was included in the patta was illusory, especially when, as to half the family property, a claim was simultaneously put forward on behalf of the daughter-in-law. I am therefore satisfied that the substantial dispute raised in 1911 was only a doubt about the joint status of the family (as found by the Courts below) resulting in the putting forward of a title to half of the property in Sitamma but did not and could not legally include a claim to half share of the sale proceeds on the ground of a possible title in 2nd defendant. The 1st defendant was therefore interested in shutting the mouth of the 2nd defendant. The situation then was that the daughter-in-law herself did not put forward her title to a half share of the property, but another person, the mother-in-law, raised a cloud over the 1st defendant's title by suggesting that the daughter-in-law was entitled to half the property. If both the mother-in-law and daughter-in law raised the dispute, a compromise would have been perfectly binding. But then the compromise which would then have been effected would be entirely unlike the compromise effected under Ex. I. Under Ex. I nothing was allotted to Sitamma. but all the 48 acres were given to the 2nd defendant. If Sitamma herself had put forward the claim she would have

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got the substantial bulk of the property surrendered by the 1st defendant as the price of peace and the 2nd defendant would have either got nothing or a very small addition to her allotment for maintenance. It is obvious therefore that what has happened is this. The 1st defendant closed the mouth of the 2nd defendant by bribing her by executing Ex. I behind the back of Sitamma whose name was used by the 2nd defendant as a Damocles' sword to threaten the 1st defendant and to induce him to execute Ex. I as a price of peace. On these facts, does Ex. I come within the scope of the rule of law which protects *bona fide* family settlements in compromise of doubtful claims or disputes and declares them to be valid, a rule of law not questioned before me by both the parties? Mr. Venkatarama Aiyar for appellant contends that the suit transaction does not come under the protection of that rule.

In *Miles* v. *New Zealand Alford Estate Company* (1) Fry, L. J., says: "I do not think the policy of the Court is to prevent real *bona fide* compromises of real and *bona fide* claims When there is a pending action it is easy to suppose that the giving up of that action is the consideration for the compromise Again, when there is real cause of action slight evidence of the claim being made may be admissible." Those sentences imply that the claims set up must be that of the person who is getting the benefit under the compromise. His Lordship then proceeds to say: "Now, in the present case, was there any real cause of action or any evidence on the part of the company that there was no cause of action." After discussing the evidence he says, "But was there any claim by a share-holder? It is not suggested that any share-holder has been advised to make any claim, or, except the angry words that passed at the meeting, that he had ever asserted a claim." I think these remarks of Fry, L. J., are applicable to the present case. Here, the title set up is of a person who does not put it forward. Sitamma never put forward any title. The same idea is implied in the language of Cockburn, C. J. in *Callisher* v. *Bischoff Sheim* (2). He says: "The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. ................Every day a compromise is effected on the ground that the party making it has a chance of succeeding in

1. (1886) 32 Ch D 266 at 297. 2. (1870) 5 Q B 449.

it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexatious incident to it." In *Shyam Lal* v. *Rameswari* (3) the Court observed at page 95 "In some of the cases, the compromise was based on the assumption that there was an antecedent title of some kind in the parties, and the compromise merely acknowledged and defined what that title was." In the present case that antecedent title is not in Kotamma but in Sitamma who had no knowledge of the compromise. At page 97 it is observed: "It is contended, that it was a family settlement, but a family settlement presupposes that there are *bona fide* claims on either side and an honest settlement after full disclosure of facts on either side. Here one party secretly and fraudulently obtained probate of a will and when the other party wanted to have it revoked, the former agreed to pay a larger annuity, and obtained an admission of the genuineness of the will which might be used against the reversioners. We do not think that in these circumstances the principle of family settlements applies." In the present case there is no claim on the part of one of the parties to the compromise who merely set up the title of a third person and the settlement was made secretly without the knowledge of the person. If all the three were parties, it would have been regarded a family settlement. A settlement made for the purpose of getting rid of a certain title set up without the knowledge of that person and without resulting in any benefit to that person cannot be regarded as a settlement of that claim. The language used in some of the other cases cited before me (*Krishna Chandra Dutta Roy* v. *Hemaja Sankar Nandi Mazumdar* (4) and *Chahlu* v. *Parmal* (5) also implies the same idea. In the notes to *Stapilton* v. *Stapilton* (6), it was said, "The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim." Now there can be no abandonment of a claim except by the person who has the title or set up his own title to the thing claimed. A cannot abandon a claim that may possibly be made

3. (1915) 23 C L J 82.
4. (1914) 22 C W N 463 at 469. 5. (1919) I L R 41 All 611.
6. White Tudor's leading cases, Vol. I, page 241.

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by B but not made by B and without B's knowledge. This is exactly the case here. The dictum of Lord Westbury in *Dixon v. Evans* (7) also shows the same thing. He says: "The claim on the one side or the defence on the other shall be admitted or not." It is suggested by the learned vakil for the respondent that Kotamma would be a reversioner after the death of her daughter-in-law and that she might be entitled to a larger rate of maintenance if the family was divided. In the first place, the evidence does not disclose that these claims were set up. But assuming that they were set up—they might well have been, for, if Sitamma was entitled to half, Kotamma was entitled to maintenance from that half and would be a reversioner if the daughter-in-law predeceases her—this only amounts to putting forward the title of Sitamma. A claim by Kotamma for larger maintenance out of the half share of Sitamma is merely a pendant to a claim by or on behalf of Sitamma for a half share in the property. Again, a claim by Kotamma that she will be reversioner after the death of Sitamma, amounts to merely putting forward a *spes successionis* and is also merely a pendant to a claim by her or on behalf of Sitamma. Either way, it cannot be regarded as a substantial claim by Kotamma for herself. Nor can the dispute set up by Kotamma be regarded as a claim for maintenance directly against the whole property in the hands of the 1st defendant. In whatever way we look at the transaction, it is difficult to avoid the main feature of it, namely, that Sitamma's name and supposed title was used to threaten the 1st defendant with and ended in a substantial benefit to Kotamma with Sitamma remaining in the background altogether. I am therefore of opinion that the nature of the transaction is substantially that of a bribe to Kotamma to keep quiet and not to stir up litigation by another claimant, namely, Sitamma, in which possibly Kotamma might have given evidence. Sitamma herself being totally igorant of the settlement, it is impossible to regard such a settlement as a family settlement or a *bona fide* settlement of a doubtful claim. I do not think, therefore, it will be upheld as against the plaintiff in this case.

The question next arises, what is the relief that should be awarded to the plaintiff. Mr. Venkatrama Aiyar contends that Ex. I should be entirely set aside and the plaintiff should be given a decree for the extra lands covered by it beyond the original 18 acres and odd given to Kotamma. I

7. (1872) L R 5 H L 606 at 619.

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do not think the cases cited by him support this plea. [*Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (8), *Davood Beevi Ammal* v. *Radhakrishna Aiyar* (9) and *Deivachilai Aiyangar* v. *Venkatachariar* (10)]. In the present case, I do not see why the alienation under Ex. I should not be binding at least to the extent of the father's half share. In the subsequent partition between the 1st defendant and the plaintiff these lands have not been allotted, to the plaintiff's share but were left out of the partition. I think the proper decree to be passed in this case is that the plaintiff should be given a decree for partition and recovery of half the land conveyed under Ex. I beyond the original 18 acres and odd with mesne profits from the date of plaint to be determined in execution...... Plaintiff will be entitled to recover the 18 acres and odd after the death of the 2nd defendant. The decree will be modified accordingly.

As each party succeeds only to the extent of a half, each party will bear its own costs throughout.

A. S. V. *Decree modified.*

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[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

Sheik Hussain Sahib ... *Appellant** (*Plaintiff*)

*v.*

Pachipulusu Subbayya and another ... *Respondents* (*Defendants*).

F. B.

Sheik Hussain Sahib *v.* Pachipulusu Subbayya.

*Natural rights—Upper and lower lands—Surface water—Flow of—Right of owner of lower land to obstruct flow of water.*

In the case of adjacent plots of lands, the owner of the land on a lower level on to which water flows in the ordinary course of nature from the land on a higher level is not entitled in law so to deal with his land as to obstruct the escape of the water from the higher land. Case Law in England discussed; I L R 29 Mad 539 and (1910) M W N 545 overruled.

Second appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore, in A. S. No. 380 of 1921, preferred against the decree of the Court of the District Munsif of Kovvur in O. S. No. 911 of 1919.

*S. A. No. 1076 of 1922 10th November, 1925.

8. (1913) I L R 40 Cal 966 : 25 M L J 512 (P C).

9. (1922) 44 M L J 309. 10. (1925) 49 M L J 317.

F. B.

Sheik Hussain Sahib *v.* Pachipulusu Subbayya.

*V. Suryanarayana* for appellant.

*B. Satyanarayana* for respondents.

The Court (Phillips and Ramesam, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—The plaintiff (appellant) is the owner of a piece of land which lies on a higher level than the land of the defendant and he seeks to prevent the defendant from erecting a bund on his land, which has the effect of preventing the flow of surface water over the plaintiff's land on to the defendant's land which is its natural outlet. The Lower Appellate Court following the ruling in *Mahamadhopadyaya Rangachariar* v. *Muncipal Council of Kumbakonam* (1) has held that the defendant is entitled to prevent water flowing over his land by erecting a bund. It is now argued for the appellant that this decision in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) is only applicable to cases where the lands are situated within a town and he relies on subsequent cases of this Court, *Ramaswami* v. *Rasi* (2) and *Maharaja of Venkatagiri* v. *Secretary of State for India* (3). In *Ramaswami* v. *Rasi* (2), the prior decision in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) was distinguished on the ground that it referred to land in a town and was therefore not applicable to agricultural land outside a town. The decision in *Maharajah of Venkatagiri v. Secretary of State for India* (3), was with reference to the right to bund a ntural stream and Seshagiri Aiyar, J. prefers to base his decision on Illustration (H) of S. 7 of the Easements Act (V of 1882) rather than Illustration (I) which deals with surface water, Illustration (H) dealing with natural streams. He, however, adds that if the learned Judge in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) intended to lay down that the principle regarding the conflict of rights should be extended to agricultural areas in rural parts, he dissents from the proposition and Wallis, Officiating C. J. takes the same view. Subramania Aiyar, J. in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) laid down the proposition that the natural right mentioned in illustration (*i*), namely, "the right of every owner of upper land that water naturally rising in,

1. (1906) I L R 29 M 539 : 16 M L J 582.
2. (1913) I L R 38 M 149 : 25 M L J 276.
3. (1914) 28 M L J 98.

or falling on such land and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto, " was not an absolute right but was the right to pass such water without incurring any liability for damages caused thereby and held that when that right came in conflict with the right mentioned in illustration (*a*), namely, " the exclusive right of every owner of land in a town to build on such land, subject to any Municipal law for the time being in force " the latter must prevail. If this proposition is correct, it would be illogical to hold that the natural right to pass water over a lower land cannot prevail in a town, whereas it must prevail in the country.

In S. 7 we have the definition of what an easement is, namely, " restriction of one or other of the following rights " which are mentioned. Because illustration (*a*) mentions the right of an owner of land "in a town" to build on such land, it does not necessarily exclude the right of an owner of land in the country to build on such land. In fact S. 7 itself deals with the exclusive right of every owner of immoveable property, subject to any law for the time being in force, to enjoy and dispose of the same and also the right of every owner of immoveable property, subject to any law for the time being in force, to enjoy without disturbance by another the natural advantage arising from its situation. *Prima facie* the owner of immoveable property is entitled to do what he pleases with his land and can only be restrained by law or by the superior right of some other person. There can be no distinction between such a right in a town and the same right in the country, unless it is subject to any law for the time being in force. We find it difficult to realise the distinction drawn between such rights in *Ramaswami* v. *Rasi* (2) and *Maharajah of Venkatagiri* v. *Secretary of State for India* (3) unless there is some law or custom having the force of law which restricts the right in rural areas, but not in urban areas. The difficulties of cultivating land are referred to and it is suggested that owing to these difficulties the natural right of an owner of land to do on it what he pleases is subject to restrictions, but this can only be if the restrictions are imposed by law or custom having the force of law. If the right of an owner to pass his surface water on to the lower land is an absolute right which the owner of the lower tenement cannot resist, it is undoubtedly an easement right enjoyed by him over the lower

2. (1913) I L R 38 Mad 149 : 25 M L J 276.
3. (1914) 28 M L J 98.

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tenement but we find in the Act that the right is given as an illustration of a right against which an easement may be acquired and is not described as being in itself an easement right. It is doubtful whether the legislature would have given a right which is in itself an easement right as an illustration of a natural right in restriction of which an easement right can be acquired. We may mention that the observations in *Maharajah of Venkatagiri* v. *Secretary of State for India* (3) with reference to illustration (*i*) of S. 7 are *obiter* inasmuch as it was found in that case that the water which was interfered with was the water of natural stream. The decision however in *Ramaswami* v. *Rasi* (2) distinctly limits the proposition put forward in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) to urban areas although in the earlier judgment there is no language to lead one to suppose that the learned Judges meant to confine the decision to urban areas. They no doubt refer to illustration (*a*) which deals with land in a town, but the right mentioned is only an illustration of the rights referred to in S. 7 and does not exclude other rights *ex jure* naturae appertaining to an owner of land. An owner of agricultural land is undoubtedly entitled to raise the level of his land if he so wishes, provided there exists no legal restriction of such act. It might thus happen that a lower land when raised would become higher in level than the adjacent land which had formerly been on a higher level. The right to pass water would thereby be reversed and the owner of the originally lower land would be entitled to pass water on to what was originally the higher land. If the owner of the lower land has such a right to raise his land over the whole of it, it is strange that he cannot raise the level over only a part, such raising having the effect of stopping the flow of water through the adjacent land but whether he has such right must depend on the extent of the right of the owner of the land which was originally higher. Three other authorities have been cited before us from other parts of India, the first being *Ambica Saran Singh* v. *Debi Saran Singh* (4) in which it was decided that the owner of higher land had the right to pass his surface water over lower land so long as it continued to be on a lower level, apparently dissenting from the decision in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1)

1. (1906) I L R 29 M 539 : 16 M L J 582.
2. (1913) I L R 38 M 149 : 25 M L J 276. 3. (1914) 28 M L J 98.
4. (1914) 24 I C 91 : 12 A L J 685.

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although in terms it does not purport to do so. In the other two cases of Calcutta and Patna respectively, the Easements Act does not apply [*Ramadhin Singh* v. *Jadunandan Singh* (5) and *Sarban* v. *Prudo Sahub* (6)]. The former case is of no assistance here, for it merely deals with the right of a party to abstain from passing water falling on his land to the lower land and to collect it on his own land. The Patna case does not refer to any authorities and the Court came to a conclusion differing from that taken in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1).

Inasmuch as the authority of *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) which was followed in *Sangana Reddiar* v. *Perumal Reddiar* (7) has been questioned in *Ramaswamy* v. *Rasi* (2) and *Maharajah of Venkatagiri* v. *The Secretary of State for India* (3) we think that it is advisable that the whole question should be considered by a Full Bench of this Court, and accordingly we refer the case to a Full Bench for decision.

*V. Suryanarayana* for appellant.

*B. Satyanarayana* for respondents.

The Court expressed the following

The judgment of the Court was delivered by

Coutts Trotter, C. J.

*Chief Justice*:—This appeal raises certain questions of fact with which we are not concerned. The question of law to which our attention has been directed is whether the owner of a plot of land on a lower level on to which water flows in the ordinary course of nature from adjacent land on a higher level is entitled in law so to deal with his land as to obstruct the escape of water from the higher land. It is said that any right which the owner of the higher land has is not in the nature of an easement and that terms such as dominent and servient tenements are inapplicable. That may be true in the abstract but it seems to me that the Privy Council and the House of Lords have clearly recognised a very close analogy between the two classes of cases and that if the owner of the land at the lower level raises an obstruction to the natural flow of the water he will be restrained if it causes or tends to cause damage to the owner of that on the higher. *Gibbons*

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1. (1906) I L R 29 M 539 : 16 M L J 582.

2. (1913) I L R 38 M, 149: 25 M L J 76. 3. (1914) 28 M L J 98.

5. (1914) 27 I C 268: 19 C W N 54.

6. (1922) 69 I C 947. 7. (1910) M W N 545.

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v. *Lenfestey* (8) is a direct authority of the Privy Council binding upon us. In the judgment of the Committee which was delivered by Lord Dunedin we have at page 57.

"The right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property; it is a question of nomenclature whether it is or is not called a servitude."

Later on we have

"Where two contiguous fields belong to different proprietors one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property."

In *John Young and Co.* v. *Bankeir Distillery Company* (9) Lord Watson says at page 696

"The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in *aemulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case, here and water artificially conveyed from a distant stream."

And then His Lordship quotes Lord Giffard in *Blair* v. *Bunter Finlay and Co.* (10). "Although there is a natural servitude on lower heritors to receive the natural or surface water from higher gounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible."

The same principle clearly underlies the decision in *Smith* v. *Kenrick* (11) and in that case Mr. Justice Cresswell in delivering the judgment of the Court said:

"There are many cases in which the principle has been recognised, that one land owner cannot, by altering the condition of his land, deprive the owner of the adjoining land

8. 113 L T (N S) 55. 9. (1893) A C 691.
10. 9 Court Sess. Cases, 3rd Series, Macpherson at p. 207.
11. (1849) 7 Common Bench 515 : 137 E R 205.

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of the privilege of using his own as he might have done before. Thus, he cannot by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house, nor from building on his own land, although it may obstruct windows, unless indeed by lapse of time the adjoining land has become subject to a right analogous to what in the Roman Law was called a servititude. So also in *Acton* v. *Blundell* (12) where the subject was very much discussed, the Court held that one land owner having dug a well on his own lands could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood which had the effect of drawing the water away from his well: the act not being done by the defendant negligently or maliciously, but in a proper manner for the purpose of winning his own coal. We think that the same principle is applicable to the present case. The water is a sort of common enemy, as was said by Lord Tenterden, in *Rex* v. *The Commissioners of Sewers for Pagham* (13) against which each man must defend himself. And this is in accordance with the Civil Law, by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving without claim to compensation, the water naturally flowing down to it."

This last case also touched on the distinction between natural and artificial accumulations of water which was later in 1888 made the basis of the celebrated decision in *Rylands* v. *Fletcher* (14). The reference seems to have been made on account of the conflict of views expressed in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) and *Sangana Reddiar* v. *Perumal Reddiar* (7) on the one hand and *Ramaswami* v. *Rasi* (2) on the other. The referring Bench in accepting the distinction drawn in *Ramaswami* v. *Rasi* (2) held that the decision in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) only referred to urban areas, and we agree that no such distinction arises. It doubtless came from the accident that illustration (*a*) to S. 7 of the Easements Act instances a case of land in an urban area because it wishes to safeguard the statutory rights of urban authorities to restrict unapproved

1. (1906) I L R 29 M 539: 16 M L J 582.
2. (1913) I L R 38 M 149: 25 M L J 276.
7. (1910) M W N 545.
12. (1843) 12 M & W 324.
13. (1828) 8 B and C 355 : 108 E R 1075. 14. (1868) L R 3 H L 330.

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methods of dealing with land and buildings. In our opinion *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) was wrongly decided and the reasoning on which it is based is clearly at variance with the decisions of the Privy Council and the House of Lords to which we have referred; and the same observations apply to *Sangana Reddiar* v. *Perumal Reddiar* (7). It cannot be that the law recognises two inconsistent rights in adjacent owners, the exercise of one of which would necessarily destroy the other.

It was contended by the respondent that, if the argument of the appellant should be correct, the owners of the adjoining lands at a lower level would be prevented from improving their lands; but this is clearly not so as the adjoining owner can improve his lands to any extent he pleases even to the extent of raising the level of his lands provided that he makes suitable arrangements for carrying off the water from his neighbour's land. We are confirmed in our view by the fact that the decision in *Ramaswami* v. *Rasi* (2) was referred to by the Privy Council in *Maunga Bya v. Maung Kyi Nyo* (15) with approval as being consistent with the authorities.

We refer the case back to the Division Bench for final disposal with this expression of opinion.

T. S. V. *Case referred back to the Bench.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Madura Municipality ... *Petitioner* (Complainant)*

*v.*

P. M. Muthu Balu Chetty. ... *Respondent (Accused)*

Madura Municipality *v.* Muthu Balu Chetty.

*The Madras District Municipalities Act (V of 1920), Ss. 249, 250 and Sch. V, cl. (q)—Scope and construction of—Rice hulling machine—Gas engine to work—Permission granted by Municipal Council for construction—Annual license if still necessary—Machinery contemplated by Sch. V cl. (q).*

A person obtained the permission of the Madura Municipal Council under S. 250 of the Madras District Municipalities Act for constructing and setting up a rice hulling machine worked by a 22 Horse Power Gas Engine. He refused to take out thereafter an annual license under S. 249 of the Act

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Crl. R. C. No. 503 of 1925. 20th January, 1926.

(Crl. R. C. No. 419 of 1925)

1. (1906) I L R 29 M 539: 16 M L J 582.

2. (1913) I L R 38 M 149 : 25 M L J 276. 7. (1910) M W N 545.

15. (195) L R 52 I A 385: 49 M L J 282.

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and was charged with an offence under Ss. 249 and 338. *Held,* a license under S. 249 was not necessary and the prosecution must fail.

Madras Act V of 1920 clearly intends to draw a distinction between "industries" and "factories." In the case of the latter it would be anomalous to hold that after the Municipal Council had granted permission for the erection of a mechanical power factory under S. 250, the chairman could under S. 249 refuse a license for its being worked or impose impracticable conditions on its working.

The machinery referred to in Sch. V cl. (*q*) is machinery of a kind that is propelled by means other than those described in S. 250, which contemplates some sort of mechanical motive power. It must be such as is likely to be dangerous to human life, health or property. Construction of the clause explained; *In re Ramachandra Rao,* 45 M. L. J. 555 approved in part and dissented from as to another part.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the judgment of the Court of the 2nd Class Magistrate of Madura Town in Calender Case No. 335 of 1924.

*F. S. Vaz* and *T. S. Viswanatha Aiyar* for petitioner.

*The Public Prosecutor, T. Rangachariar* and *S. T. Srinivasagopalachari* for respondent.

The Court delivered the following

Waller, J.

ORDER:—*Waller, J.*:—This petition has been filed by the Municipal Council of Madura against the decision of the Sub-Magistrate of Madura Town. Respondent was charged under Ss. 249 and 338 of the Madras District Municipalities Act with having failed to take out a license for using a 22 horse power gas engine to work a rice hulling machine. The Sub-Magistrate refused to convict. He found that the case was governed by S. 250 and not by S. 249 of the Act. He was further of opinion that machinery used for rice hulling was not the kind of machinery contemplated by Sch. V (*q*).

It is argued on behalf of the Municipal Council that all that is required by S. 250 is permission for the original construction or establishment of a factory and that for the actual working of the factory an annual license is necessary under S. 249. I agree with the Sub-Magistrate that the argument is unsound. The Act clearly intends to draw a distinction between what it describes as "industries" and "factories." The former are dealt with in S. 249 and the latter in S. 250. The industries included in S. 249 and Sch. V are licensed by the Chairman subject to the control of the Council. The power factories referred to in S. 250 are regulated by the Council itself subject to the orders of the Governor in Council,

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It would, I think, be completely anomalous to hold that, after the Council had granted permission for the erection of a mechanical power factory, it is open to the Chairman to refuse a license for its being worked or to impose impracticable conditions on its working.

I think that the Magistrate was right in holding that a license under S. 249 of the Act was not necessary in this case. I am also of opinion that the machinery referred to in Sch. V is machinery of a kind that is propelled by means other than those described in S. 250, which contemplates some sort of mechanical motive power. A decision of Krishnan, J has been cited *In re Ramachandra Rao* (1) which deals with cl. (*q*) of Sch. V. As I consider that S. 249 and Sch. V do not apply to this case at all, that decision does not really call for any discussion. All that I need say in regard to it is that I agree with Krishnan, J. that the machinery referred to in cl. (*q*) of Sch. V must be such as is likely to be dangerous to human life, health or property. The object of the clause is, as he says, to bring under control the storing, manufacturing, and using of things which are dangerous to human life, or health, or property. The "fuel or machinery" referred to in the clause must, I think, be of a sort that comes within that category. At the same time, I do not agree with him that the whole clause is governed by the words "which is likely to be dangerous to human life, or health or property." The first two parts of it cannot be so governed. The words "manufacturing anything from which offensive or unwholesome smell arise" cannot grammatically be subject to a clause which begins "which is likely". Nor is it necessary to hold that the first two clauses are governed by the last. It is sufficiently obvious that the storing of explosives or combustibles and the manufacturing of things from which offensive or unwholesome smells arise are likely to be dangerous to human life, or health, or property, and no further qualification of them as such appears to be necessary. In my opinion the last clause governs that part of cl. (*q*) which begins with the words "using for any industrial purpose........"

In the result, I must dismiss the revision petition.

*Devadoss, J.*:—I agree.

T. S. V. *Revision petition dismissed.*

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1. (1923) 45 M L J 555.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS AND MR. JUSTICE VISWANATHA SASTRI.

Linga Aiyar *alias* Ramalinga Aiyar . . *Appellant** (1st *Deft.*)

*v.*

Lakshumanan Chettiar and another ... *Respondents* (*Plff. and 2nd Deft.*).

Linga Aiyar *v.* Lakshumanan Chettiar.

*Civil Procedure Code, S. 47, Explanation—Party to suit—Defendant whose "name" has been "struck off" if a—Plaintiff not wishing to proceed further against him—Striking off in case of—Propriety—Proper procedure in such case.*

The plaintiff sued to recover certain money due on dealings and promissory note from (1) the widow of *S* and (2) his brother. The District Munsif, by consent, "struck off" the brother's name, and ordered the plaintiff to pay half of his costs. The question arose whether the brother of *S* was, in spite of that procedure, a party to the suit under S. 47, Explanation of Civil Procedure Code, It appeared that, in spite of his name being struck off, his name was retained in the cause-title in the decree which was finally drawn up.

*Held*, that in spite of the brother's name being struck off, he was a party to the suit within the meaning of S. 47, Explanation.

Striking out is the proper procedure to be employed in the case of misjoinder. In any other case the proper course is dismissal. Striking off is not appropriate to the case of a party against whom the plaintiff does not wish to proceed further.

Second Appeal against the Decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 12 of 1921 preferred against the decree of the Court of the District Munsif of Dindigul in Original Suit No. 1380 of 1919.

*A. Krishnaswami Aiyar* and *M. Patanjali Sastri* for appellant.

*K. P. Padmanabha Pillai* for respondents.

The Court delivered the following

JUDGMENT:—This is an appeal from the decree of the Subordinate Judge of Dindigul confirming in part the decree of the District Munsif of Dindigul. The suit was brought by the plaintiff for a declaration that certain property in the hands of the 1st and 2nd defendants belonged to a debtor of his, Subbaraja Aiyar. The 2nd defendant was Subbaraja Aiyar's widow and the 1st defendant was his brother. The suit was brought in consequence of the allowance of a claim petition in favour of the brother, the 1st defendant. Ex. B is the judgment in O. S. No. 598 of 1917 in which the same plaintiff sued to recover from the widow and the brother certain money due on dealings and promissory notes. The

*S A No. 180 of 1923. 8th September, 1925.

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District Munsif in the fourth paragraph of his judgment states as follows: "By consent I strike off the 2nd defendant's name. Plaintiff will pay by consent half of his costs."

The point raised in second appeal is whether the 2nd defendant is in spite of that procedure a party to the suit under S. 47 (explanation). If he is, the present suit is barred and the proper remedy would be by way of appeal under that section. For the respondent stress has been laid on the form of words used by the learned District Munsif, namely, that the 2nd defendant's name was "struck off." It is admittedly a form of words more appropriate to striking off a misjoined plaintiff or defendant than applicable to the case of a party against whom the plaintiff does not wish to proceed further, as is the fact in the present case. It is well known that the state of the law was uncertain until the legislature enacted the explanation to S. 47 whereby the Madras view as contained in *Ramaswami Sastrulu* v. *Kameswaramma* (1) was affirmed as against the view of certain other High Courts. In that case it was held that when a party defendant is exonerated from a suit, *i. e.*, the suit is dismissed against him and a decree passed against a co-defendant and in execution of that property belonging to and in possession of the exonerated defendant is attached and sold, the latter is not entitled to maintain a suit, but the question of his claim to and recovery of possession of the property is a question falling under S. 244 (now S. 47 of the Code). The case in *Rama Rao* v. *The Raja of Pittapur* (2) shows that the substance of the order and not the form of it is to be regarded. In that case a preliminary objection was taken against the maintainability of the appeal as the learned Subordinate Judge had struck out the name of the 1st defendant under O. 1, R. 10 (2) and removed him from the record. It was contended that that being so no appeal was provided, but Mr. Justice Seshagiri Aiyar says: "In my opinion this is an adjudication determining the rights of the plaintiffs to bring a suit of this nature, and his order is a 'decree' as defined in S. 2 (2) Civil Procedure Code. Consequently where a substantial claim has been adjudicated upon and where the party's name has been struck out not on the ground that a suit against him would not lie and where a substantial relief claimed in the suit has been ordered to be deleted, I am of opinion that the Court has conclusively adjudicated the rights of the parties with regard to a matter in controversy and that therefore the

1. (1900) I L R 23 M 361: 10 M L J 126 (F B).
2. (1918) I L R 42 M 219: 36 M L J 169.

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order of the Subordinate Judge is a decree." The important part for the present purpose of the judgment is that we are to regard the substance of the order and not the form. It is quite clear that if the learned District Munsif in the suit of 1917 had said he dismissed the suit as against the 2nd defendant the case would have been perfectly plain and S. 47 would have applied. The trouble has arisen because he has employed the words "struck out." The authoritative case on the subject is *Sannamma* v. *Radhabhayi* (3). There the Full Bench held that where a party has been properly impleaded as one of the defendants in the case and it is not contended in the present case that the 2nd defendant was improperly impleaded the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against this defendant, he is a defendant against whom a suit has been dismissed within the meaning of the explanation to S. 47. The learned Chief Justice expresses the opinion that under O. 1, R. 10 (2) the proper course would be for the Court to exercise the power which it now has of ordering at any stage of the proceedings the name of a defendant improperly joined to be struck out instead of dismissing the suit against him. That will, following the decision in *Ramaswami Sastrulu* v. *Kameswaramma* (1), have the effect of taking him out of the operation of S. 47 which ought not to apply to him seeing that he has no real connection with the suit. Therefore the opinion of the Full Bench is that striking out under O. 1, R. 10 (2) is the proper procedure to be employed in the case of misjoinder. In any other case the proper course is dismissal. This would appear to be also the opinion of the learned Judges who decided the case reported in *Krishnappa* v. *Periyaswami* (4) that where a party sets up a paramount title in a mortgage suit to both the mortgagor and the mortgagee and has been exonerated from the suit on the ground of misjoinder he does not remain a party to the suit for the purpose of S. 47.

The Lower Courts here have dealt with this question in, what may be described as a perfunctory manner. The issue is distinctly raised as No. 6 in the suit. The learned District Munsif says: "As stated in the latter Full Bench ruling in *Sannamma* v. *Radhabhayi* (3) the 1st defendant's

1. (1900) I L R 23 M 361: 10 M L J 126 (F B).
3. (1917) I L R 41 M 418: 34 M L J 17 (F B).
4. (1916) I L R 40 M 964: 32 M L J 532.

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name should be deemed to have been struck off from the record though erroneously retained in the cause title in the decree, and as such the 1st defendant cannot be said under S. 47 to be a person against whom a suit has been dismissed." This opinion has not been attempted to be supported by the learned counsel for the respondent and it is in my opinion an entire misreading of the result of the Full Bench case in *Sannamma* v. *Radhabhayi* (3). It does however furnish one possibly useful item, and that is, that in spite of the 2nd defendant's name being struck off, his name was retained in the cause title in the decree that was finally drawn up so that if, as insisted by the learned counsel for the respondent, one is to insist on the importance of the form, this would seem to show that the 2nd defendant's name had in fact not been struck off. The learned Subordinate Judge deals with the point in an even more perfunctory manner. He says: "The failure to strike off his name is not a ground for holding that he is still a party to the suit" referring to the alleged mistake of continuing the 1st defedant's name in the cause title of the decree. In my opinion, following the Full Bench ruling in *Sannamma* v. *Radhabhayi* (3) there can be no other conclusion than that what the learned District Munsif really did in the original suit was to dismiss it as against the 2nd defendant. By an unhappy or mistaken use of language he used the expression "Strike off" in the judgment which is I think appropriate only to the case of misjoinder of parties, or causes of action. I therefore am of opinion that the suit is incompetent throughout. The second appeal must be allowed and the suit dismissed with costs throughout. The memorandum of objections is dismissed without costs.

Viswanatha Sastri, J.

*Viswanatha Sastri, J*:—I fully agree with what has fallen from my learned brother and have nothing to add.

A. S. V. *Appeal allowed.*

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3. (1917) I L R 41 M 418: 34 M L J 17 (F B).

## PRIVY COUNCIL.

PRESENT:—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

[On Appeal from the High Court of Judicature at Madras.]

Sri Mirza Raja Sri Pushavati Alakh Narayan Gajapatiraj Maharaj Manya Sultan Bahadur Garu, substituted for Rai Saheb V. T. Krishnama Chari ... *Appellant**

*v.*

The Secretary of State for India in Council represented by the Collector of Godavari ... *Respondent.*

P. C.

Sri Rajah Pushavati Alakh Narayan Gajapatiraj *v.* Secretary of State for India.

*Submergence of land adjoining river—Subsequent reappearance thereof—Adjacent owner's claim thereto as accretion—Government appropriation thereof—Levy of penal assessment—Madras Land Encroachment Act (III of 1905), Ss. 2, 3, 5, 6 and 16—Reduction into possession—Ryotwari tenure—Relinquishment.*

A lanka, *A,* in a river was, since 1862, occupied and cultivated, under Government pattas, by ryots who paid assessment therefor. About 1880-1885, this lanka gradually disappeared through erosion and submergence, and payment of the Government assessment ceased. About 1894, a new lanka, *B,* of nearly the same area as *A* re-appeared on the site, and was taken possession of by the owner of the adjacent, lanka *C,* as an accretion thereto, and he also proceeded to grant leases thereof to cultivators. After survey, the Government decided that it was a re-formation *in situ* of the old submerged lanka, *A,* and notified the owner of *C* in 1912 of the levy of a penal assessment from him, under the land Encroachment Act (III of 1905) for his unauthorised occupation. He replied by instituting a suit for the declaration of his title to the new lanka, alleging that he had been in possession thereof from its formation, that the Government not havng reduced it into possession, could not, in view of S. 6 of the Act, levy penal assessment under Ss. 3 and 5; that as the same site was let out in ryotwari tenure prior to the submergence, S. 2 (*i*) (*e*) excluded it from the operation of the Act. He also contended before the Board, though not before the Lower Courts in India, that the assessment, if any, under the Act, was leviable only from persons (*e. g.* the lessees) in physical occupation of the land, and not from owners who had merely granted leases thereof *bona fide* believing it to be an accretion to his adjacent property.

*Held,* (1) the contention that assessment was, under the Act, only leviable from persons in physical occupation of the land, was, in view of the appellant's attitude throughout the proceedings, and the statements contained in his plaint, new, and he was accordingly now estopped from raising it: (2) the levy of the penal assessment under the Act was justified and proper as from the date the Act came into force, because (*i*) the cessation of the payment of assessment after the submergence, the omission of the entries of the ryot holdings in Register, the cancellation of the land from the pattas, and the subsequent demand by the ryots for re-settlement of the re-formed land—all tended to show that the submerged land had been relinquished; (*ii*) the claim of Government to the

*P C Appeal No. 55 of 1924. 18th January, 1926.

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re-formed land was not "by escheat, resumption, or reversion" within the meaning of S. 16 of the Act to necessitate its being reduced into possession as a preliminary to the levy of assessment.

Appeal from a decree, dated 18th March, 1920, of the High Court (Sir A. Rahim, Ag. C. J., Ayling and Seshagiri Aiyar, JJ.) which substantially affirmed the decree of the Subordinate Judge of Cocanada (A. Raghunatha Rao, Esq.), dated 31st December, 1915.

The facts are set forth in the judgment of their Lordships.

*W. H. Upjohn, K. C., K. V. L. Narasimham* and *P. K. Subba Rao* for appellant:—The penal assessment is contrary to the Land Encroachment Act (III of 1905); for under Ss. 3 and 5 thereof only those in physical possession (*e. g.* lessees) of the land are liable to it, and not the owner, who has granted leases of it in good faith believing it to be an accretion to his property. This is clear from the remedy provided by S. 6 (*i*), *viz.*, forfeiture and eviction, which could hardly have been intended to be used against one occupying as owner. Further, the land being held by ryots under pattas, S. 2 (*i*) (*e*) excluded it from the operation of the Act. These pattas had not been relinquished, and their lapse could not be presumed. *Mazhar Rai* v. *Ramgat Singh* (1); *Arun Chandra Singh* v *Kamini Kumar Bardhan* (2). Finally, S. 16 applies the Act only to lands "claimed by Government" and "reduced into possession" by it. Like all penal statutes, this must be strictly construed.

*L. de Gruyther, K. C.* and *K. Brown* for respondent:—The appellant's plaint and his conduct throughout the proceedings have been those of a person who admitted he was in possession; the contention that he is not has now been raised for the 1st time and he should not now be allowed to avail himself of it. In any event, the Act applies to him; *Madathapu Ramayya* v. *Secretary of State* (3). Again, relinquishment of the pattas by the ryots was a matter of evidence and inference, and the Courts had abundant material before them to conclude, as they did, that they had relinquished. Finally, land covered by water is presumed to be in the possession of the owner. *Secretary of State* v. *Krishnamoni* (4); *Kumar Basanta Roy* v. *Secretary of State* (5).

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1. (1896) I L R 18 A 290. 2. (1913) L R 41 I A 32 : 26 M L J 251.
3. (1903) I L R 27 M 386 : 14 M L J 37 (F B). 4. (1902) L R 29 I A 104.
5. (1917) L R 44 I A 104 : 32 M L J 505.

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18th January, 1926. The Judgment of the Board was delivered by

Lord Salvesen:—This is an appeal from the High Court of Judicature at Madras, dated the 18th March, 1920, which substantially affirmed a decree in judgment dated 31st December, 1915, of the Subordinate Judge at Cocanada in a suit at the instance of the appellant against the respondent. This suit arose out of a dispute as to the ownership of a lanka in the river Godavari in the Province of Madras, the extent of which was estimated, at the commencement of the suit, at 247 acres. The appellant is the owner of large estates, including the village of Kotipalli, situated on the banks of that river. The respondent is the Secretary of State for India, represented by the Collector of Godavari. It is common ground that in 1862 there existed a lanka which was Government property, and for the cultivation of which pattas were issued by the Government of the day to ryots connected with the village of Sanapalli, which lies in the neighbourhood of Kotipalli. This lanka was cultivated under these pattas for a number of years thereafter, and the Government assessment was duly paid by the cultivators. An example of such a patta has been produced in the present suit. It is dated in 1869, and indicates that erosion on a somewhat minute scale had already commenced to affect the area of the lands in question. Gradually the river encroached more and more upon these lands until, some time between 1880 and 1885, the whole of the lands had been totally submerged. After some years of total submergence a new lanka appeared in the river which, by 1894, was of an area substantially the same as the lands in suit. At that time one, Mudragada Nagayya was a lessee of the Kotipalli Lanka, under a lease granted by the owner of the estate, now represented by the appellant, the duration of which was 10 years from 1892. Nagayya took possession of the re-formed lands as forming an accretion to the Kotipalli lankas and paid rent to the appellant for these lands as well as for those originally embraced in his lease, and cultivated, through sub-lessees of his own. He did not, however, do so without objection and, from 1897 onwards, petitions were presented by the ryots of the Government village of Sanapalli complaining to the Government that the suit lands formed part of the old Sanapalli village, and requesting the Government to recover them from the appellant and grant them back to the ryots. The Government directed a survey of the lands and, after a lengthy correspondence between the appellant and

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the Government, the latter claimed the suit lands as Government property. In 1911 the Government sent notices to the appellant under S. 7 of the Madras Land Encroachment Act (Madras Act III of 1905). These were followed by a notice dated 3rd February, 1912, demanding payment of Rs. 74,971.86, representing the penalty and block rates for the years 1900 to 1911, during which the appellant was alleged to be in unauthorised occupation of the suit lands.

On the 30th July, 1912, the appellant's predecessor in title instituted the present suit. In this he prayed for a judgment declaring his right to the 247 acres already referred to and to all accretions that might be made thereto, and for a permanent injunction against the Government restraining them from interfering with him in his ownership and enjoyment of the same by levying a penal assessment or by other steps. An immense amount of evidence was tendered at the trial, which it was stated occupied over 50 days of judicial time. The issue of fact which was responsible for most of the time occupied was whether the reformed lands in question were an accretion to the appellant's lands of Kotipalli or constituted a reformation *in situ* of the lands which had been formerly cultivated by the ryots of the Government. This issue of fact has been decided by both Courts against the appellant and is no longer in controversy.

The issues which still fall to be dealt with concern the legality of the penal assessment imposed on the appellant in 1911, and, as the case was presented to the Board, this assessment was challenged upon three grounds:—

(1) That an assessment, whether penal or otherwise can only be imposed under the terms of this Act on "any person who shall unauthorisedly occupy any land which is the property of the Government." The appellant conceded that it must be now taken to be a fact that the land in suit is the property of Government and that it had been unauthorisedly occupied, but he maintained that the only persons upon whom the assessment could be levied were those in physical occupation of the land and not upon the owner of the estates of Kotipalli, who had merely granted leases of these lands under a *bona fide* belief that they formed accretions to his property. He founded this particularly upon S. 6 (1), which makes the crops or other produce of the lands liable to forfeiture, which provision, he contended, could only be applicable to the actual cultivator and not to the landlord who, by the very fact of

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granting a lease of the lands, had excluded himself from occupation. Whatever force there may be in this contention, their Lordships do not propose to express any opinion upon it. Their Lordships hold that this contention is not open to the appellant in view of his actings before and throughout the litigation. The plaint contains the following passages:—

> "The lanka in dispute has been in possession and enjoyment of the plaintiff's predecessors and plaintiff for several years."

and in Paragraph 8 the plaintiff also submits that:—

> "Madras Act III of 1905 is not retrospective in its operation and does not entitle the Government to recover assessment from the plaintiff, as he was in possession and occupation long prior to the coming into force of Madras Act III of 1905."

Not merely is there no reference to the construction which is now proposed to be put upon the Act in the plaint (which, indeed, in terms directly negatives the view now presented), but there is no trace of the contention being tabled throughout the voluminous proceedings in the Courts below. Even the appellant's case, although it is directed entirely to the legality of the penal assessment, does not contain a challenge of it upon this ground. There may have been occasions when the Board have entertained an argument on a pure question of law, although it has not been presented in the lower Court, where all the facts on which the contention depended had been definitely ascertained, but the objection to doing so in the present case goes very deep. The whole controversy between the appellant's predecessor and the Government which preceded the actual imposition of the penal assessment proceeded upon the admission or the tacit assertion, of the appellant that he was in occupation of the lands, or at all events, that he took upon himself the burden of vindicating the action of his own lessees or sub-lessees in cultivating it. Had this point been, at any time, mooted, the Government would have had an opportunity of considering upon whom the notice of assessment which they ultimately sent to the appellant should have been given, and upon whom the penal assessment should have been levied. After a period of nearly 25 years has elapsed between the date when the Government first definitely intimated their claim to the lands in suit, their Lordships are clearly of opinion that it is too late for the Board to entertain this contention. A litigant who has all along maintained a position in support of one, and in this case the more important, branch of his suit cannot be permitted, when he fails upon this

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branch, to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at a great disadvantage. There could be no clearer case for the application of the doctrine of estoppel owing to the conduct of the litigant.

(2) The second ground of attack by the appellant is based upon S. 2 (1) of the Madras Act III of 1905. By that section all lands, wherever situated, are thereby declared to be the property of the Government, subject to the large exceptions enumerated under five heads which expressly preserve private rights. The exception founded on is contained in sub-section (*c*), which exempts from the operation of the clause all lands which are the property "of any person holding under ryotwari tenure. . . . or in any way subject to the payment of land revenue direct to Government." The respondent conceded that, before the submergence of the lands in suit, they came within this exception. He also conceded that, after a durkhast is made and a patta granted by Government, the interest of the ryot holding under this form of tenure is permanent, hereditary and transferable, that no ejectment at the instance of the Government is competent for arrears of rent, and that such arrears can only be recovered, as in the case of all Government revenue, by sale of the property held under this tenure. On the other hand, it is common ground that the holder of land under ryotwari tenure is entitled, at any time, to relinquish it, and the Standing Orders of the Board of Revenue applicable to Madras contain elaborate provisions dealing with this particular kind of tenure, and also with questions relating to the form of relinquishment, remission of rent and the like.

The High Court have dealt very exhaustively with the numerous points which have been argued on the question whether the relinquishment by the ryots of Sanapalli village who held the pattas before their respective lands became submerged can be inferred from the whole circumstances of the case, including a vast amount of documentary evidence. They drew the inference that it must be held as a fact that the ryots did relinquish their holdings (and thereby secured immunity from further assessment in respect of them) as and when the lands became submerged and no longer capable of cultivation, and that, when the lands were re-formed *in situ*, they were the property of the Government and at their absolute disposal. Their Lordships agree with the reasoning of the High Court, and

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they will only summarise some of the considerations to which they attach most weight.

Mere submergence of land held under ryotwari tenure does not infer a relinquishment by the holder. On the other hand, if he wishes to retain his right to the submerged lands on the offchance of their being re-formed *in situ* at some future date, he must continue to pay year by year the assessment or rent which is due to Government. There are instances referred to in the documentary evidence in which some of these ryots, whose lands were only partially eroded, continued to do so and so kept alive their rights, but, in the ordinary case, the poor cultivator's interest is to relinquish the lands so as to escape paying the annual rent in the hope that, at a future date, should the lands be re-formed *in situ,* he may obtain a new tenure from the Government. On the other hand, according to the Standing Orders, all land for which a stipulated rent continues to be paid must be entered in the registers which these orders prescribe. The registers contain not merely an enumeration of all the lands in the district to which they apply in individual numbers, but they specify the acreage of the individual plots and also contain a record of the amount of rent leviable from each ryot in respect of the plot or plots he holds. In the case of Sanapalli village it has been found by concurrent findings of the Courts below that, when the land in question became submerged, it was not merely omitted from the ayacut or acreage of the village, but also from the gudikat or rental roll. The submerged land was likewise struck out of the pattas which constitute the evidence of title given to the holders under ryotwari tenure. These pattas are subject to revision from time to time when changes of circumstances occur; thus, if part of the land to which a ryot has right is eroded and relinquished by him, the rent corresponding to the part relinquished is deducted from the rent previously payable. In the case of submerged lands the pattas appear to have been surrendered and, at all events, not one of them has been produced. It is common ground that none of the ryots who held pattas of the lands prior to submersion has paid any rent to the Government on these lands. These circumstances support the inference that the ryots concerned relinquished their holdings, which had indeed, in the then existing circumstances, become valueless. The only possible alternative is that we are to infer that the Government, from humanitarian motives, had remitted the rent due by the ryots.

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Such remissions are competent under the Standing Orders, but they can only be made by the authority of the Board of Revenue, and the inferior officials, including the Collector, have no power at their own instance to make them. No evidence is adduced of any such remission having been asked or having been granted spontaneously. Further, in the petitions presented to the Government in 1897 and onwards, although in one or two of them there are statements to the effect that the former ryots had not relinquished their holdings, there was no claim ever made by any individual ryot to the effect that an identifiable portion of the re-formed lands was his property. On the contrary, the petitions proceeded on the footing that it was the duty of the Government to recover the lands in the illegal occupation of the appellant and to re-settle them upon the ryots of the village of Sanapalli without reference to the particular ryots who held the lands before the submergence. One suggested method of the Government so settling them was that the lands should be exposed to auction so that those ryots of Sanapalli who were prepared to pay most for the lands would obtain pattas from Government at the rents which they offered. The evidence to be derived from the petitions points to the ryots of Sanapalli village accepting the position that the Government was entitled to re-settle the lands, but urging that a preference should be given to the ryots of the village by whose inhabitants the lands had formerly been cultivated. A review of the whole facts disclosed by the evidence leads irresistibly to the conclusion that the lands in suit on their re-emergence from the river became once more the absolute property of the Government both under the Madras Act III of 1905, and at common law exactly as they had been in 1862 when the ryotwari tenures were first instituted.

(3) Lastly, it was maintained by the appellant that S. 16 of the Madras Land Encroachment Act III of 1905 exempted the lands in question from its operation. The section is in these terms:—

> "Nothing in this Act shall apply to any lands claimed by right of escheat resumption or reversion until such lands have been reduced into possession by Government."

It was argued for the appellant that, as the lands had been throughout occupied by himself or his tenants, they had never been reduced into possession by the Government, and that they were lands "claimed by Government" within the meaning of the clause. Their Lordships are unable to take this

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view. They are clearly of opinion that these lands were not "claimed by Government" within the meaning of the section. Before submersion these lands were the property of the Government, subject only to the rights of the ryotwari tenures which they had created. The moment these rights were relinquished by the ryots the Government were free to deal with them as they pleased. The effect of the relinquishment was to restore to the Government full freedom to dispose of what was originally their own. The appeal on this ground also fails. It is right to note that the apparent hardship of the appellant being subjected to a penal assessment in respect of the unauthorised occupation of lands of which, on plausible grounds, he believed himself to be the owner, has in this case been largely if not entirely obviated by the judgment of the High Court declaring the levy illegal for the years prior to the coming into force of the Madras Act III of 1905. This part of the judgment has not been challenged by either party.

Their Lordships will therefore humbly advise His Majesty that the decision of the High Court of Judicature at Madras should be affirmed and the appeal dismissed with costs to the respondent.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondent: *Solicitor, India Office.*

A. de M. *Appeal dismissed.*

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## [FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

F. B.

B. Munuswami Naidu In the matter of.

*In the matter of* Mr. B. Mfnuswami Naidu, B. A., B. L., High Court Vakil, practising at Chittoor*

*Letters Patent (Madras) cl. 10—Negligence—When amounts to professional misconduct.*

Negligence by itself does not amount to professional misconduct, for, to amount to professional misconduct there must enter the element of moral delinquency. 86 Law Times 468 followed.

Where owing to the negligence of his clerk, a vakil failed to apply in time for certified copies of a judgment and decree in order to enable his client to appeal to the High Court but he throughout accepted civil liability for his

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*6th October, 1925.

F. B.

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clerk's negligence to the extent of any proved loss in consequence of it, no question of professional misconduct on the part of the vakil arises.

Proceedings under cl. 10 of the Letters Patent.

A complaint having been made to the High Court by S. Ponnuswami Pillai, contractor, and agent of C. Thayarammal appellant in A. S. No. 267 of 1921 on the file of the Court of the Subordinate Judge of Chittoor (A. S. No. 119 of 1921 on the file of the District Court of Chittoor) and Dharmakartha of Appukutti Pillai Choultry of Renigunta, residing at No. 29, Perumal Mudali Street, Pudupakkam, Madras, against Mr. B. Munuswami Naidu, B. A., B. L., High Court Vakil, practising at Chittoor—

(1) that the said Mr. B. Munuswami Naidu, having been engaged as Vakil of the said C. Thayaramma in the said Appeal Suit No. 267 of 1921 on the file of the Court of the Subordinate Judge of Chittoor, preferred against the decree of the Court of the District Munsif of Madanapalle in O. S. No. 309 of 1920, and having been put in possession of enough funds, failed to take the necessary steps to get in time certified copies of the judgment and decree in the said appeal suit No. 267 of 1921, for enabling the said C. Thayaramma to prefer a Second Appeal to the High Court and thereby deprived her of the right of Second Appeal, and

(2) that therefore the said Mr. B. Munuswami Naidu neglected his duty towards his client, the said C. Thayarammal who in consequence, suffered serious loss and damage and that thereby the said Mr. B. Munuswami Naidu rendered himself liable to be dealt with under the disciplinary jurisdiction of the High Court for unprofessional conduct, the High Court under cl. 10 of the Letters Patent directed that the said Vakil, Mr. B. Munuswami Naidu, be called upon to show cause why he should not in the circumstances stated be removed from the roll of Vakils of the High Court, or be otherwise dealt with for his unprofessional conduct, mentioned above.

*The Advocate-General* for the Crown.

*P. Venkatramana Rao* on behalf of the said Vakil.

*T. R. Ramachandra Aiyar* on behalf of the Vakil's Association.

The Judgment of the Court was delivered by

Coutts Trotter, C. J.

*Chief Justice.*—The charges framed, if they were substantiated would prove no more than negligence on the part of the Vakil's clerk. It is only fair to the Vakil to say that he

has throughout accepted civil responsibility for his clerk's negligence to the extent of any proved loss in consequence of it by the client. But it has been laid down clearly in England in the case of G. M. C. (in the proceedings against Mr Mayor Cooks, a Solicitor) 86 Law Times, 468, and also by a Bench of this Court in a judgment delivered on the 7th December, 1923 *In the Matter of Dr. T. C. K. Kurup, Bar-at-Law, Advocate, High Court, Madras*, the Court consisting of the then Chief Justice, Phillips, and Ramesam, JJ. that negligence by itself is not professional misconduct; into that offence there must enter the element of moral delinquency. Of that there is no suggestion here, and we are therefore able to say that there is no case to investigate, and that no reflection adverse to his professional honour rests upon Mr. Munuswami Naidu.

T. S. V. *Complaint dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

S. Adaikkala Thevan and another ... *Appellants* (Petitioners-Defendants 1 and 3)*

*v.*

The Imperial Bank, Madura Branch, through its agent Mr. E. B. Shawe and others ... *Respondents (Respondents 1 to 3 and nil. Pltffs. 1 to 3 and Receiver).*



*Civil Procedure Code, Ss. 94, 136 and O. 39, R. 2 (3)—Scope of—Injunction order passed by the High Court—Disobedience of, by party in the mofussil—Contempt of Court—Punishment—Mode of enforcement.*

O. 39, R. 2 (3), Civil Procedure Code, applies not only to disobedience of an order issued under clauses (1) and (2) of that rule, but has a more general application, and applies equally to disobedience of all injunctions issued under S. 94 of the Code.

Where an injunction order issued by a Division Bench of the High Court on the Appellate Side is disobeyed by a party residing in the mofussil, the Judges constituting the Bench in punishing him for contempt can adopt the procedure laid down in S. 136 of the Civil Procedure Code and send to the appropriate District Court the warrant of arrest and the order of attachment for necessary action being taken. In such a case, the District Court on receipt of the warrant could adopt the procedure laid down in S. 136.

***Quaere:***—If in such a case S. 136 can in terms apply, as the High Court on its Appellate Side has jurisdiction over the whole of the Presidency?

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*A A O No. 59 of 1925 and C M P No. 1015 of 1925. 17th November, 1925.

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Appeal against the order dated 10th February, 1925 of the Court of the Subordinate Judge of Dindigul in I. A. No. 29 of 1925, in O. S. No. 3 of 1925.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to punish the respondents for breach and contempt of the injunction passed by the High Court in L. P. A. No. 44 of 1925 preferred under cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Wallace dated 20th February, 1925 and made on C. M. P. No. 707 of 1925, praying for stay of further proceedings by way of appointing an interim Receiver in I. A. No. 10 of 1925—I. A. No. 29 of 1925 in O. S. No. 3 of 1925 on the file of the Court of the Subordinate Judge of Dindigul pending disposal of appeal against Order No. 59 of 1925 on the file of the High Court.

*T. M. Krishnaswami Aiyar* for appellants in A. A. O. No. 59 of 1925 and respondents in C. M. P. No. 1015 of 1925.

*B. Sitarama Rao* and *S. R. Muthuswami Aiyar* for 2nd respondent in A. A. O. No. 59 of 1925 and petitioners in C. M. P. No. 1015 of 1925.

The Court made the following

ORDER:—This is an application to punish the respondents for disobedience of an injunction granted by this Court. How serious and deliberate has been the disobedience, will appear from the facts which we shall briefly state. The 1st plaintiff in O. S. No. 3 of 1925 on the file of the Subordinate Judge's Court of Dindigul is the Imperial Bank of India and the 2nd plaintiff obtained a lease of the suit lands from the 1st plaintiff on the 30th of June, 1924, to take effect from the 16th of July, 1924. There was a prior lease in favour of the 1st defendant which expired on the 15th of July, 1924, and the 2nd plaintiff was obstructed in the act of taking possession by the defendants some of whom alleged that the Imperial Bank had agreed to execute in their favour a fresh lease. The plaintiffs thereupon filed the suit asking for possession and mesne profits. There were crops on the land valued at Rs. 6,000 odd and on the plaintiffs' application the Subordinate Judge appointed on the 10th of February, 1925, a Receiver with power to take possession of and harvest the standing crops. There was an appeal to this Court and an order was made by Mr. Justice Wallace on the 20th February, 1925. On the ground that that order was ambiguous the

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plaintiff filed a Letters Patent Appeal. On the 20th of February, 1925, we made an order restraining the defendants from entering upon the land and harvesting the crops until they furnished security for Rs. 6,000 and if the security was not furnished the Receiver would continue to be in possession. The plaintiffs made an application on the 10th March to this Court to punish the respondents for disobedience to the order and in support of the application various affidavits have been filed.

Abdul Wahab Sahib, an agent of the 2nd plaintiff, in an affidavit, dated the 9th of March, 1925, has set out very clearly some of the acts of disobedience. We may mention that our order was made after notice to the respondents and in the presence of their learned vakil Mr. T. M. Krishnaswami Aiyar. Although the order was made on the 26th, the respondents continued to cut, harvest and remove the crops on and from the 27th of February. Without giving security they collected a large number of men and in spite of protests carried off the crops. The Receiver who had been appointed, reported to the Sub-Court on the 27th of February, the 1st of March, and again on the 4th of March. On the 2nd of March, the respondents removed about 7 cart-loads of paddy and on the 3rd of March 10 cart-loads. Between the 3rd and the 10th, they further harvested the crops on about 30 to 40 acres and removed a large quantity of paddy. The men were armed with sticks and rifles and behaved in a highhanded manner. The respondents made a show of complying with the order to furnish security but it was not eventually furnished.

We adjourned the application from the 10th to the 16th to enable their vakil to communicate with the respondents. Advantage was taken of this adjournment and between the 11th and the 14th they continued to harvest the crops. These facts are spoken to by the 2nd plaintiff and his watchmen Vellayamba and Nachimuthu who have filed affidavits. On the 27th of March the 2nd respondent filed a counter-affidavit stating that the harvesting and the removing of the crops had to a large extent been completed before the order was made and making a definite allegation that there still remained about 70 kulis or about 45 acres to be harvested. The 1st respondent swore to an affidavit on the 6th of April containing similar but less definite allegations. The plaintiffs' agent in his reply affidavit, dated the 12th of April, swore that since filing their affidavits the respondents rapidly proceeded with the harvesting of the crops on the remaining 40 acres.

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We are satisfied that the version of the plaintiffs is substantially correct. The facts we have set forth show that the respondents have deliberately defied the order and even after their conduct was brought to our notice they did several acts in utter disregard of the authority of the Court.

There is another aspect of the case to which we must draw attention. On the 12th of August, in view of the fact that if the allegations against the respondents were true, they would be guilty of a gross contempt, we directed them to be present in Court when we heard the motion. They accordingly appeared and the application was partially heard on the 5th of October. On that day, as it was represented to us that if further time was granted the respondents would give security and that the proceedings against them might be then dropped, we complied with their request and adjourned the application directing them to be present in Court on the adjourned date should it become necessary to further hear the application. It now transpires that in spite of this adjournment not even an attempt was made to give security and it is even more significant that the respondents have failed to appear before us and their learned vakil has reported that he has no instructions.

The respondents have been guilty of a serious contempt in failing to appear before us. Their conduct throughout has been fraudulent and they have deliberately defied the injunction issued by this Court. We do not at present feel called on to deal with the respondents for their failure to comply with our order to appear in Court. Nor do we propose in regard to their disobedience of the injunction, to commit them in the exercise of our inherent and extensive jurisdiction in respect of contempt. We think that it is unnecessary to use the very large powers that the High Court possesses, as in our opinion the respondents can be adequately punished under the provisions of the Code.

Under S. 94, Civil Procedure Code, the Court is empowered to commit a person guilty of disobedience of an injunction to the civil prison and to direct that his property shall be attached and sold. O. 39, R. 2 (3) prescribes the punishment and under it, the person in default may be detained in the civil prison for a term not exceeding six months and his property may be attached. The drafting of this rule, as has been pointed out in *Ramprasad Singh* v *The Benares Bank, Ltd.* (1)

1. (1919) I L R 42 All 98.

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is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. O. 39, R. 2 (3) applies not only to disobedience of an order issued under clauses (1) and (2) of that rule but has a more general application, it applies alike to disobedience of all injunctions issued under S. 94. See also *Vidyapurna Thirthaswami* v. *The Vicar of Suratkal Church* (2).

We think that the respondents are deserving of no consideration and we order that they be detained in a civil jail for a period of six months and that their property be attached.

Then remains a matter of some importance to be considered. How is our order to be executed? S. 136 of the Code prescribes the procedure to be followed where any person is to be arrested or any property is to be attached under a provision not relating to the execution of decrees and such person resides or such property is situate outside the jurisdiction of the local limits of the Court. In this case the arrest and attachment are under the provisions of the Code not relating to the execution of decrees. So far the section applies.. But there is some difficulty in regard to the other portion of the section which says that the person shall reside or the property shall be situate outside the local limits of the jurisdiction of the Court. In the present case our order is one made in the exercise of our appellate jurisdiction and the High Court has jurisdiction on its appellate side over the whole of the Presidency. The respondents are outside the limits of the City and it may be said that though they are outside the limits of the ordinary Civil Jurisdiction of the High Court they are certainly within the limits of its appellate jurisdiction. We do not think that it is necessary to decide this point. Whether section 136 strictly applies to the case or not, there is nothing to prevent us from adopting the procedure laid down in that section and sending to the appropriate District Court the warrant of arrest and the order of attachment for necessary action being taken. The District Courts, their officers and staff are undoubtedly subject to the jurisdiction of and are under the supervision of the High Court and we see no difficulty in directing this mode of execution. The District Court on receipt of the warrant and order will adopt the procedure prescribed by S. 136.

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2. (1917) 7 L W 328.

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It is suggested to us that we might send a special bailiff from this Court. This is more cumbrous and expensive than the procedure which we have resolved to adopt.

The respondents besides disobeying the order of injunction have behaved very dishonestly and fraudulently. Having first obtained an adjournment they utilised the interval to commit further acts of depredation. They again obtained an adjournment agreeing to give security and they failed to do so and not only did they fail to do so but they also wilfully kept away from Court with the deliberate object of evading its process. The 1st respondent, we understand, is the principal offender and he will therefore pay the costs of the application which we fix at Rs. 200 (two hundred).

Since delivering the above judgment it has been brought to our notice that the 2nd respondent did not file in Court the counter-affidavit dated 27th March to which we have referred. The case was argued on the footing that that affidavit was in Court, and we had before us only a copy of it. It would seem that Mr. T. M. Krishnaswami Aiyar, the learned vakil for the 2nd respondent, furnished a copy to Mr. Sitarama Rao, but omitted to file the original affidavit in Court. So far as our judgment is concerned, this makes very little difference, for, without that affidavit the case of the respondents is distinctly worse.

The order of attachment and the warrant shall be transmitted to the District Court of Madura. The properties to be attached shall be specified in the order to be transmitted by this Court. Mr. Sitarama Rao undertakes to give a list of the properties in two weeks from this day.

A. A. O. No. 59 of 1925 is dismissed with costs.

No order is necessary on any other application.

T. S. V. *Appeal dismissed : Application for contempt allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS.

V. N. Alagar Aiyangar ... *Petitioner** (*2nd defendant*)

*v.*

Srinivasa Aiyangar and another ... *Respondents* (*Plaintiffs*).

Alagar Aiyangar v. Srinivasa Aiyangar.

*Court-fee—Jurisdiction—Valuation for purposes of—Hindu Law—Joint family—Father—Alienation as manager and guardian of minor sons—Suit by*

*C R P No. 624 of 1924. 30th April, 1925.

Alagar Aiyangar v. Srinivasa Aiyangar.

*latter for declaration of invalidity of alienations as against their shares and for partition and possession thereof—Nature of—Valuation for purposes of Court-fee and jurisdiction.*

The suit was by the plaintiffs for a declaration that certain alienations made by the 1st defendant, their father, in respect of certain items of property were not valid and binding as against the two-thirds share of the plaintiffs and for partition and possession of two-thirds share in those and other plaint properties. The plaint properties were the joint properties of the plaintiffs and the 1st defendant, who was the family manager. The alienations in question were made by the 1st defendant not only as manager but also as the guardian of the plaintiffs.

*Held,* that the suit, though in form for a declaration, was really one for setting aside or cancellation of the sale-deeds to which the plaintiffs were parties and which *prima facie* bound them, and must be valued as such for purposes of Court-fee and jurisdiction.

*Held further,* that as the plaint reliefs were outside the pecuniary jurisdiction of the Munsif, he was right in returning the plaint for presentation to the proper Court.

Petition under S. 115 of the Act V of 1908 praying the High Court to revise the judgment of the District Court of Ramnad at Madura in C. M. A. No. 1 of 1924 preferred against the order of the Court of the Principal District Munsif of Srivalliputtur in O. S. No. 954 of 1922.

*S. Rajagopalachari* for petitioner.

*S. Narayana Aiyangar* for respondents.

The Court delivered the following

JUDGMENT:—This is an application to revise the order of the District Judge of Ramnad in C. M. A. No. 1 of 1924. The plaintiffs in O. S. No. 954 of 1922 on the file of the Principal District Munsif's Court of Srivalliputtur seek for a declaration that certain alienations made by the 1st defendant in respect of certain items of property are not valid and binding as against the two-thirds share of the plaintiffs and for partition and possession of two-thirds share in these and other plaint properties. The plaint properties are the joint properties of the plaintiffs and their father, the 1st defendant, who was the family manager. They originally valued the plaint as if it were one for possession of their two-thirds share in all the plaint schedule properties and paid *ad valorem* Court-fee apparently in accordance with S. 7 (5) of the Court Fees Act. The learned District Munsif held that the suit although in form for a declaration was really one for setting aside or cancellation of the sale-deeds executed by the 1st defendant in so far as they related to the shares of the plaintiffs, and valued

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the plaint reliefs at Rs. 3,965. This was outside his pecuniary jurisdiction. He accordingly returned the plaint for presentation to the proper Court. The learned District Judge, to whom an appeal was taken, was of opinion that the plaintiffs were entitled to treat the alienations in question as absolutely void and that they were entitled to proceed on that footing and that if the alienation should subsequently be found in the suit not to be so void the suit in respect of these items should simply be dismissed. I am unable to agree that this is the policy of the Court Fees Act. If that were so, there is no difficulty in seeing that anomalies would arise. A plaintiff could grossly undervalue his suit, plead that his plaint is only for a declaration and then say: "If it is found that my plaint is for more, dismiss my prayers with regard to the rest." This would lead not only to great waste of judicial time and would also encourage absolutely unsustainable claims. These alienations were made by the father of the plaintiffs not only as manager of a joint Hindu family but also as their guardian. In my opinion, therefore, the minors appear as parties to these alienations which are *prima facie* binding on them. The power of a Hindu father may be more or may be less than the power of a guardian to bind his minor sons, but unless it can be established that the alienations were for unnecessary or illegal purposes (for which the onus is on the minors) the alienations are *prima facie* good. See *Subba Goundan* v. *Krishnamachari* (1). Of the cases cited on the other side in *Unni* v. *Kunchiamma* (2) the document was not executed by the plaintiffs or by any person under whom they claimed. *Kamraju* v. *Gunnayya* (3) was not a case of Court-fee. There a vendor of the plaintiffs sold the property to them on the footing that a sale by his mother made during his minority as his guardian was not binding on him. He had chosen to avoid it and obtained a complete title which would become effective if the Court ultimately found that the sale by the mother was not binding as alleged. I cannot see that this case has any bearing on the present, whereas in *Achammal* v. *Achammal* (4), a case very similar to the present, where all the plaintiffs but one were parties to the deed through their mother as guardian, it was held that a suit in which the plaintiffs ask for a declaration that a *jenm sale* deed of the suit properties was not valid and binding on their tarwad must be treated as a suit for the cancellation of the deed and an *ad valorem* fee

1. (1921) I L R 45 Mad 449 : 42 M L J 372. 2. (1890) I L R 14 Mad 26.
3. (1923) 18 L W 233 : 45 M L J 240. 4. (1910) 20 M L J 791.

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was requisite. Further it was held that the application of any particular clause of S. 7 must depend on the substance of the claim and not on the mere words used in the plaint. In 1922 by Madras Act V of that year a further sub-clause (a) was added to S. 7 (4) whereby in a suit for cancellation of a document securing property having a money value the amount or value of the property for which the document was executed is the amount on which the *ad valorem* Court-fee is to be paid. See also *Logan Bart Kuer* v. *Khakhan Singh* (5). In *Arunachalam Chetty* v. *Rangaswami Pillai* (6) it was held that a suit for a declaration that a decree or a document is not binding is a suit under sub-clause 4 (*c*) and must be stamped *ad valorem*. In my opinion, the learned District Judge is wrong and the plaint must be construed as a plaint for cancellation or avoidance of these alienations to which the minors were parties and which *prima facie* bind them. The order of the learned District Judge must be set aside and that of the learned District Munsif restored with costs throughout.

A. S. V. *Appellate Order set aside and that of the Munsif restored.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Ryali Brahmayya and another ... *Appellants** (*Petitioners*)

*v.*

Dronamraju Venkatasuryanarayanamurthy ... *Respondent* (*Respondent*).

Brahmayya *v.* Venkatasuryanarayanamurthy.

*Scheme for temple—Liberty in, to persons interested to apply to Court in regard to any matter arising out of the scheme—Validity of—Archaka of temple—Application under said provision to Court to direct trustee to pay him arrears of salary—Maintainability—His remedy by suit—Civil Procedure Code, S. 92.*

Paragraph 14 of a scheme framed for a temple was as follows:—"Liberty to apply to the Court is hereby granted to the trustee or to any person interested in regard to any matter arising out of this scheme or seeking any modification thereof."

The appellants, the archakas of the temple, applied to the Sub-Court to direct the respondent, the trustee, to pay them their salary due for seven months, contending that cl. 14 of the Scheme entitled them to the relief claimed by means of an application to the Court which framed the Scheme.

*Held,* that the remedy of the appellants was by a suit and that they were not persons who came within the purview of the said paragraph.

A general clause in a scheme providing for application to the Court with regard to the Scheme is *ultra vires.*

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*A A O No. 20 of 1923. 13th November, 1925.

5. (1917) 3 Pat L J 92. 6. (1914) 28 M L J 118 (F B)

Brahmayya v. Venkata-suryanarayanamurthy.

It is not the function of a Civil Court to concern itself with the management of any institution except in so far as it is permitted by the Civil Procedure Code.

Appeal against the order of the Court of the Subordinate Judge of Narasapur dated the 6th day of September, 1922 and made in I. A. No. 255 of 1922 in O. S. No. 46 of 1918.

*A. Satyanarayana* for appellants.

*V. Suryanarayana* for respondent.

The Court delivered the following

JUDGMENT:—The appellants who are archakas of a temple applied to the Subordinate Judge of Narasapur to direct the defendant, the trustee, to pay them their salary due for seven months. The subordinate Judge dismissed their application and they prefer this appeal.

The contention of the appellants is that there is a provision in the scheme for an application of this kind and therefore the Subordinate Judge was wrong in refusing their prayer. Para. 14 of the scheme is as follows:—

"Liberty to apply to the Court is hereby granted to the trustee or to any person interested in regard to any matter arising out of this scheme or seeking any modification thereof."

The appellants are only Archakas of the temple. If the trustee does not pay their salary, their remedy is by a suit. If the contention of the appellants is to be upheld it would mean that the Court is to administer the trust estate in which a scheme is framed. Could it be said that a person who gives credit to the trustee for temple expenses is entitled to apply to the Court to direct the trustee to pay the amount due to him? We are clearly of opinion that the appellants have mistaken their remedy and they have no right to move the Court by virtue of paragraph 14 of the scheme already referred to, to apply to the Court for relief.

The appellants rely upon *Prayag Doss Ji Varu Mahant* v. *Thirumala Sri Rangacharlavaru* (1), *Damodarbhat* v. *Bhogilal* (2) and *Prayag Doss Jee Varu* v. *Thirumala Purisa Srirengacharlu* (3). In view of the recent pronouncement of their Lordships of the Privy Council in *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee* (4) the above decisions cannot be considered good law; and it is, unnecessary to consider that question, as the appellants do not ask for execution of the decree wherein the scheme is set out but for reliefs in respect of services rendered to the temple. Granting that paragraph 14

1. (1905) I L R 28 M 319 : 15 M L J 133. 2. (1899) I L R 24 B 45.
3. (1908) I L R 31 M 406. 4. (1925) 49 M L J 25 (P C).

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gives power to persons interested in the scheme to apply to the Court for relief, the appellants are not persons who come within its purview. In this connection we are constrained to observe that a general clause in the scheme providing for application to the Court with regard to the scheme is *ultra vires*. No doubt such a clause was put in many schemes, and such clause is opposed to the principle of S. 92 Civil Pro. Code. For such of the matters as are concerned by S. 92, the sanction of the Advocate-General is to be obtained. By the introduction of a clause in the scheme that applications for the removal of the trustee and for the framing of a new scheme can be made to a Court, S. 92, Civil Procedure Code is practically given the go-by.

The introduction of such a clause will throw upon the Court not only the heavy burden of deciding petty applications of a vexatious nature, but also of practically administering the trust institution. The Court should as far as possible be saved the trouble of directly or indirectly interfering with the internal management of temples and trust properties. It is not the function of a Civil Court to concern itself with the management of any institution except in so far as it is permitted by the Civil Procedure Code. In *Narayanamurthi* v. *Achayya Sastrulu* (5) the learned Judges observe at page 718: "It is far from desirable that Courts should assume to themselves the continued supervision of institutions, for the management of which they are called upon to frame schemes." They further remark. "We are disposed to consider though in the view we are taking it is unnecessary to decide the point that such decrees are *ultra vires* having regard to the express provisions of S. 92 of the Civil Pocedure Code which makes it imperative that for the purpose of getting certain relief in respect of public charities, suits should be instituted by persons interested after getting the sanction of the Advocate-General." *Narayanamurthi* v. *Achayya Sastrulu* (5) was followed by Spencer and Madhavan Nair, JJ. in C. M. A. No. 75 of 1925.

The cause of action of the appellants is purely a private one and it has nothing to do with the scheme and therefore their application was rightly dismissed by the Lower Court.

This appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

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5. (1924) 47 M L J 714.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

The Deputy Collector, Cocanada... *Appellant* (Referring Officer)*

*v.*

Deputy Collector, Cocanada *v.* Maharaja of Pittapur.

The Maharajah of Pittapur... *Respondent (1st claimant).*

*Land Acquisition Act, S. 31 (2), Proviso (3)—Applicability—Excess payment wrongfully made—Remedy of aggrieved party—Liability of Government to pay him.*

Proviso (3) to S. 31 (2) of the Land Acquisition Act only comes into operation when S. 31 (2) itself has been obeyed, and does not apply to a case of excess payment wrongfully made. It is not right that Government should throw on a party, whose property it has compulsorily acquired, the risk and burden of recovering the compensation from some one else to whom Government has wrongfully paid it.

Appeal against the order of the District Court of Godavari, dated 4th August, 1923, in E. P. No. 64 of 1923 in O. S. No. 164 of 1920.

*The Government Pleader* for appellant.

*S. Srinivasa Aiyangar* and *S. Venkatesa Aiyangar* for respondent.

The Court delivered the following

JUDGMENT:—The award of the District Court directed that the amount awarded by it should be paid to each party. We think this is a clear direction that Government shall pay to each party the amount awarded to him. That is the essential motive and meaning of an award and Government is bound, *prima facie,* to supply the money required to pay each party the amount of compensation due to him.

In the present case unfortunately, the Deputy Collector had not obeyed S. 31 of the Land Acquisition Act, and instead of depositing in Court the amount to be apportioned, paid over to the tenants the amount awarded by him to them. Consequently, when the District Court increased the Zamindar's share of the total compensation, the balance due to him was not available in Court for payment over to him. The Government view is that the Zamindar must recover it from the tenants to whom it was paid in excess. The Government Pleader calls in aid the third proviso to S. 31 (2). We do not think this proviso has any application. It only comes into operation when S. 31 (2) itself has been obeyed, and does

*A A O No. 391 of 1923. 10th December, 1925.

Deputy Collector, Cocanada v. Maharaja of Pittapur.

not apply to a case of excess payment wrongly made [see *Rajah Nilomini Singh Deo Bahadur* v. *Ram Bandhu Rai* (1)].

We think that Government was bound, under the provisions of the Land Acquisition Act, to have ready in the District Court the amount awarded by the Referring Officer for distribution according to the decision of the District Court. If the District Court had, in a proper reference, increased the amount of compensation, Government is bound to pay into Court the amount of increased compensation. The principle is not altered when an apportionment of the compensation amount is increased, and if the Referring Officer had obeyed S. 31, the necessary money would have been there. It is not right that Government should throw on a party, whose property it has compulsorily acquired, the risk and burden of recovering the compensation from some one else to whom Government has wrongfully paid it. Whether Government can, by appropriate proceedings, recover the excess from those to whom it was paid is for Government to consider. We are not prepared at this stage to grant time to Government, as requested by the Government Pleader, to appeal against the award of the District Court. It seems to us a proper award and the appeal time has long ago expired.

We see no reason to interfere with the order of the Lower Court and dismiss the appeal with costs.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

Jankiram Chetti ... *Appellant** (*1st defendant*)

*v.*

Nagamony Mudaliar ... *Respondent* (*Plaintiff*)

Jankiram Chetti v. Nagamony Mudaliar.

*Hindu Law—Will—Construction—Bequest to divided brother and his sons—Nature of estate taken—Joint—Tenancy or tenancy-in-common—Rules applicable—Joint Hindu family—Property if necessary.*

A Hindu died leaving his widow, sons, daughters and divided brothers. By a clause in his will he bequeathed some properties "to my brother *K* and his sons." The evidence disclosed that *K* and his sons were living together, but it was argued that they had no joint family property. On a question arising as to

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*O S Appeal No. 38 of 1924. 3rd April, 1925.

1. (1881) I L R 7 C 388: 8 I A 90 (P C).

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the nature of the bequest, *held, K* and his sons took as tenants-in-common and not as joint tenants.

*Per Kumaraswami Sastri, J.*:—In cases where the donees are the sons and grandsons and would succeed to the property of the testator in the absence of any testamentary disposition and take the property as ancestral property, the presumption may be drawn where the will is silent as to the nature of the estate conferred, that they would take it as unobstructed heritage with the same incidents as would follow, if there was no will. But where the donees, though members of a joint undivided family, are not related to the testator or, though related to him, would in the absence of any will either immediately or at a later stage take the property as obstructed heritage and only as tenants-in-common, there is no reason for applying the presumption that the testator by devising the property to them intended that there should be a joint tenancy. Case-law discussed.

*Per Krishnan, J.*:—If property is given in terms expressly to a joint Hindu family, the family would take it with all the incidents of ancestral or joint family property. In each case the question has to be decided on the words of the will whether the bequest was to the joint family or to the members of it individually in which case they take in severalty. If there is nothing in the will to show definitely and clearly that the bequest is to the family and not the individual members thereof separately, the ordinary presumption that when there are several joint donees they take as tenants-in-common must prevail.

*Per curiam*:—There is nothing in Hindu Law which says that possession of property is a necessary pre-requisite for the constitution of a joint Hindu family.

On appeal from the judgment of Mr. Justice Devadoss in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 166 of 1922.

*A. Krishnaswami Aiyar* (with him *K. Rajah Aiyar* and *K. G. Srinivasa Aiyar*) for appellant.

*K. Krishnamachariar* and *K. M. Bhashyam Aiyangar* for respondent.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS:—*Kumaraswami Sastri, J.*:—The only question raised in these appeals is whether the respondent, who is a legatee under the will of one O. Kandaswami Mudaliar, took the property bequeathed under the will as a tenant-in-common with his father and brothers or as a joint tenant.

The will which has been probated is filed as Ex. F. The testator Kandaswami Mudaliar died leaving a widow, three sons and two daughters. He also left two brothers one of whom was Kadirvelu Mudaliar (father of the respondent) who was appointed executor. There was another brother Krishnaswami Mudaliar who had two sons. So far as the respondent is concerned, the terms of the will concerning him are very short. Paragraph 4 of the will says:—

"Items 4, 5, 6, 7, 8 and 9 under assets in paragraph 1 above, I bequeath and leave to my brother G. Kadirvelu Mudaliar and his sons."

Paragraph 5 goes on to state that in consideration of the help given by Kadirvelu Mudaliar as regards the business carried on by the testator, he bequeaths to Kadirvelu Mudaliar and his two sons a half share in the stationery business carried on in the Minerva Press and Thompson and Company, that the stationery business should be conducted by Thompson and Company, that the profits arising from the same, as per accounts separately and correctly maintained, should be divided equally every year before the end of March between his sons on the one part and his brother and his sons on the other. In case his sons do not agree with his brother and his sons, the stationery and stock-in-trade were to be valued and the testator's sons were to give Kadirvelu and his sons one-half of the estimated value.

It appears from the evidence, and it is not disputed before us, that the testator and his brothers were members of a divided family and that the brothers and their children were living together as members of an undivided family, though it is contended by the respondent's vakil that there was no joint family property owned by Kadirvelu and his sons who were legatees aforesaid. It is also clear from the evidence that Kadirvelu and his sons would not, in the ordinary course, succeed to the properties of the testator as the testator left a widow, sons and daughters and that Kadirvelu and his sons were at best only remote heirs.

So far as the terms of the will go, there is very little to indicate that Kadirvelu and his sons were to take the property as members of a joint family with rights of survivorship. It is argued by the vakil for the appellant that the fact that the testator gives the property to Kadirvelu and his sons without naming his sons and the fact that in paragraph 10 of the will the gift to the daughters provides for a sale of the house and the division of the sale-proceeds equally among the daughters, if necessary, indicate that the gift to Kadirvelu and his sons was a gift to them as members of a joint family. It is argued by the respondent's vakil that the fact that paragraph 3 of the will which gives certain items to the sons of the testator expressly states that the property shall be the common property of his sons whereas the next paragraph which contains a gift to Kadirvelu and his sons does not make any such statement as to the property being common property shews that

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the testator's intention was the other way. It is also stated that the clause as regards the daughters in paragraph 10 of the will was so worded because one of the daughters was omitted and so it was necessary to mention the names and that as the property was a house which could not be divided equally, provision had to be made for the distribution of the sale-proceeds. If we had to depend solely on the will and look to its terms for a construction of the estate which Kadirvelu and his sons took, I do not think it can be said that there was an intention displayed by the testator in express language to indicate that Kadirvelu and his sons took the property as members of a joint family with all the rights and obligations arising therefrom. Some reliance was placed by the vakil for the respondent on the fact that Kadirvelu, who was executor and trustee under the will, shortly after the will executed conveyances to the various legatees including himself and his sons and that the terms of these conveyances indicate that the donees took the property as tenants-in-common and not as joint tenants.

It was argued that even assuming that the intention of the testator was that the gift was to be taken by them as members of a joint family, the act of the executor in conveying the estate to the various legatees as tenants-in-common was sufficient to impress the legacy with that character whatever may have been the intention of the testator. This question was not raised in the pleadings nor was it put in issue and as pointed out by the vakil for the appellants there are subsequent documents which show the dealings with the property by the adult members of the joint family and I do not think this aspect of the question can be raised for the first time in appeal as it is a mixed question of law and fact as to how the property was treated after the death of the testator.

Another question which was raised before the learned Trial Judge was whether, if Kadirvelu and his sons had no joint family properties at the date of the gift, it can be said that they are members of a joint undivided Hindu family so as to call in aid the presumption that the gift to them was as joint tenants. The argument that found favour with the Trial Judge was that if there was no joint family property in existence there could be no joint family. In cases where persons live together and are joint in food and worship, it is difficult to conceive of their possessing no property not even the ordinary household articles which they would enjoy in common. There

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is nothing in Hindu Law which states that the properties should be immoveable properties or that there should be any minimum value which is required to constitute a joint family. It is therefore very difficult to say of any persons that live together, unless they are a number of ascetics owning no properties at all in the world, that there is no property-in-common of any sort or kind. Nor is there anything in Hindu Law which says that possession of property is a necessary requisite for the constitution of a joint family. It is no doubt true that so far as Courts are concerned, the affairs of a joint family can come before a Court only where property is involved, but that is due to Civil Courts not taking cognizance of disputes unless they are of a civil nature and such disputes can hardly arise where there is no property worth the name which the joint family possesses. Supposing that a family is joint and possess joint property, all of which is either destroyed by fire or flood or is stolen or alienated, can it be said that the moment this happens the family becomes a divided family, and does it become joint family again if properties are again acquired by the members? I think it will lead to strange consequences if such a doctrine was upheld. I am not prepared to assent to the broad view that the possession of property is a necessary element in determining whether persons are joint or separate. A joint family is composed of persons who live together and who are joint in food and worship and the possession of property is not a condition precedent to the establishment of their status.

I do not think that the question whether the donees had or had not joint family properties has any bearing on the construction of the will.

In this state of things we have to fall back upon the presumption that arises in cases of gifts of this kind, viz., gifts to persons who constitute a joint family.

In dealing with this class of cases, I think that a difference should be made between cases where gifts to persons who form a joint family are made by persons to whom they would succeed according to the law of intestate succession if no will was made, for example, gifts by a father to his children and by a husband who dies without issue to his wife or daughter and cases where gifts are made by will by persons to whom the donees would not inherit and who could have no interest in the properties on the death of the testator but for the will. In the former class of cases the authorities in Madras show that

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a presumption may be drawn that the donees were intended to take the estate as joint tenants but I do not think that in the latter class of cases there is any ground or necessity for drawing such a presumption. There is a conflict of opinion between the various High Courts even as regards cases where a father bequeaths property to his sons who are members of an undivided family. It is unnecessary to refer to the various decisions of the various High Courts as their Lordships of the Privy Council in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (1), have summarized the authorities. Their Lordships observed as follows:—

"It appears that there has been great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest, made by a father of property which in the father's hands was self acquired, to his sons. In Calcutta, in 1863, the point first arose in the case of *Muddan Gopal* v. *Ram Buksh* (2) when it was held that such property would be ancestral, and this has been followed in the later case of *Hazari Mall Babu* v. *Abaninath Adhurjya* (3), decided in 1912. In Madras, upon the whole, the view seems to be that the father can determine whether the property, which he has so bequeathed, shall be ancestral or self-acquired on the principle of *cujus est dare ejus est disponre,* but that unless he expresses his wish that it should be deemed self-acquired it is ancestral. See *Tara Chand* v. *Reeb Ram* (4) and compare it with *Nagalingam Pillai* v. *Ramachandra Tevar* (5) and other cases. In Bombay, on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention it is deemed self-acquired. See *Jugmahondas Mangaldas* v. *Sir Mangaladas Nathubhoy* (6) and *Nanabhai Ganapatrao Dhairyavan* v. *Acharatbai* (7). At Allahabad the decision was that such property is self acquired. See *Parsotam Rao Tantia* v. *Janki Bai* (8) decided in 1907. Finally in Oudh, in the case of *Rameshar* v. *Mussammut Rukmin* (9) decided in 1909, after a review of all the cases, it was held that, where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be

1. (1923) I L R 45 All 596 : 47 M L J 260 (P C).
2. (1866) 6 W R 71.
3. (1912) 17 C W N 280.
4. (1866) 3 M H C R 50.
5. (1901) I L R 24 Mad. 429 : 11 M L J 210.
6. (1886) I L R 10 Bom 528.
7. (1886) I L R 12 Bom 122.
8. (1907) I L R 29 All 354.
9. (1909) 14 O C 244.

held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death.......................But their Lordships deem it unnecessary to pronounce upon these points. It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts, and it may be that when this time comes, this Board will prefer to go back to the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case."

In *Nagalingam Pillai* v. *Ramachandra Tevar* (5) which is the leading case on the subject in Madras, the will was by a Hindu father who was possessed of self-acquired property and the disposition was in favour of his sons. Shephard, J., after stating that the father might have bequeathed the property to a stranger and that his sons could not have called the dispositions in question observed:

"As the father is at liberty to make any disposition he pleases or to leave his self-acquired property to descend as ancestral property, so when making any disposition in favour of his son, he is at liberty to preserve for the property the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral property, or as self-acquired property must be a question of intention turning on the construction of the instrument of gift. Following the principles laid down in *Mahomed Shumsool* v. *Shevukram* (1875) 2 I. A. 7. I think that if there are no words indicating a contrary intention, the natural inference should be that the father intended his sons to take his property as their ancestral estate."

*Yathirajulu Naidu* v. *Mukunthu Naidu* (10) is also a case where a father bequeathed property to his sons; Subramania Aiyar, J.; at page 373 observes as follows:—

"The remaining point for consideration in connection with this house is whether the sons took it as tenants in common as contended on behalf of the 4th defendant. The decision of the Judicial Committee in *Jogeswar Narain Das* v. *Ram Chund Dutt* (11) points out that the principle of joint tenancy as obtaining in England is quite foreign to the Hindu Law and that, when property is gifted to more than one, in the absence of anything in the grant to the contrary, the presumption is that the donees take as tenants-in-common. But as implied in that decision itself joint ownership of another description is of course not only not foreign to the Hindu system, but quite familiar to it; *viz.*; that special kind of which

5. (1901) I L R 24 Mad 429 : 11 M L J 210.

10. (1905) I L R 28 Mad 363 : 15 M L J 299.

11. (1896) I L R 23 Cal 670 : 6 M L J 75. (P C).

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the joint holding by the members of an undivided Hindu family is the type. And in cases like the present, the question for determination is but one of intention to be ascertained with reference to the terms of the particular will. If the grant is to persons who are incapable of forming a Hindu joint family, they can of course take only as tenants-in-common. If, on the contrary, the grant is to persons who constitute such a family, even then it may be that the *prima facie* view is, that they take in severalty and that those who argue in favour of the opposite construction have to show some clear foundation for it in the terms of the will. Of course, the donees here, the sons, were persons who could be, and were, members of a joint family."

*Venkataramiah Pantulu* v. *Subramaniam Pillai* (12) was a case where the will was by a father giving property to his sons. *Indoji Tithoji* v. *Kothapalli Rama Charlu* (13) was also a case of a Hindu father bequeathing his self-acquired property to his sons by will and Abdur Rahim and Spencer, JJ., referred to *Nagalingam Pillai* v. *Ramachandra Tevar* (5) with approval. In *Raja of Ramnad* v. *Sundara Pandiaswami Thevar* (14) Seshagiri Aiyar J., considered the case where property was given to a son by a father and observed: "In my view the fact that the defendant took the estate as a gift from his father will not take away the liability which would have devolved on him if he had succeeded to the property as son and heir. As pointed out in *Nagalingam Pillai* v. *Ramachandra Tevar* (5) where property is given by will to a person who would otherwise be entitled to it as heir, the character of the property is not changed. The same principle should be extended to transfer *inter vivos*."

In fact it was conceded in the course of the arguments that all the Madras cases with the exception of the case reported in *Mahalakshmi Amma* v. *Nagappa* (15) are cases where the gifts are by a father to his sons. *Mahalakshmi Amma* v. *Nagappa* (15) was no doubt a case where the gift was by a person to whom the donees would not be heirs in the ordinary course of events; but the judgment proceeds on the ground that the terms of the will indicate that the donees were intended to take the gift as members of a join family, the circumstance being that the adult member was to manage the properties. As regards cases where the donees, though forming

5. (1901) I L R 24 Mad 429 : 11 M L J 210. 12. (1914) 16 M L T 489.
13. (1919) 10 L W 498. 14. (1914) 27 M L J 694.
15. (1921) 62 I C 814.

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members of a joint family, would not succeed in the ordinary course, I see no reason to extend the same principle. I can find nothing in the authorities which state that the mere fact that a gift was to persons who formed the members of an undivided family by a person to whom they would not succeed on intestacy or by a stranger, without more, necessarily implies that the donees were intended to take the gift with all the incidents of joint family property, because they are members of a joint family—especially as members of a joint family can and often do own separate or self-acquired property. It is a well-settled rule of Hindu Law that in cases of obstructed inheritance a male succeeding takes the property as a tenant-in-common and not as a joint tenant. If, as I take it in *Nagalingam Pillai* v. *Ramachandra Tevar* (5) the *ratio decidendi* is that because but for the will the donee would have taken it as ancestral property, it is therefore a reasonable presumption to draw that where a testator gives property to such a person without in terms indicating his intention he intended it to be taken in the same character as he would have taken but for the disposition this would not apply to cases where the donees would succeed, if there was an intestacy, as tenants-in-common, or in eases where they would not be even reversioners to the estate but strangers. There is no reason for it. In *Mahomed Shumsool* v. *Sevakram* (16) their Lordships of the Privy Council remark that it may be assumed that a Hindu knows as a general rule at all events women do not take absolute estate of inheritance which they are entitled to alienate, and that, in construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the disposal of property. In cases of persons who, like the respondent, his father and brothers in the present case, would, if they succeed eventually take as tenants-in-common under Hindu Law, there is no reason to suppose that the testator, knowing this fact, intended them to take as joint tenants, it is more reasonable to presume that he wanted them to take the ordinary estate they would have taken if they succeeded on intestacy and to require express words if the contrary was intended by the testator. There is in my opinion little reason to apply the observations of the Privy Council to cases of bequest to persons who would not take the estate as joint tenants if they succeeded on intestacy and much less to persons who would not be heirs in any event. In *Rewun Persad* v.

5. (1901) I L R 24 Mad 429 : 12 M L J 210. 16. (1875) 2 I A 7.

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*Mussamat Radha Beebi* (17) the testator gave his widow a life-estate in all his property and after her decease he gave one-half to his brother and his sons. It was held that the sons took a vested interest in the property as tenants-in-common and not as joint tenants. The facts of this case show that at the date of the death of the testator the brother and his sons to whom one-half was given were members of an undivided family and that the division was only afterwards, and their Lordships of the Privy Council observed: "The testator after the death of his widow, gives the property to his brother Beekhary Das. After his death it becomes divisible into two parts. We apprehend that they would take as tenants-in-common; in fact, that they had each of them a vested interest in one-fourth share not to come into actual enjoyment till the death of the widow."

It is difficult to distinguish the facts of that case from those of the present one with the exception that the sons were named by the testator in *Rewan Persad* v. *Mussamat Radha Bibi* (17) but in the present case the gift was to the father and his sons, the sons not being named; but I do not think that makes any difference. In *Karuppai Nachiar* v. *Sankaranarayana Chetti* (18) Sir Arnold White, C. J. and Subramania Aiyar and Bhashyam Aiyangar, JJ., who constituted the Full Bench observed at page 305:

"It would be revolutionary to hold that all property which comes to two or more persons who happen to be members of an undivided family is taken by them with benefit of survivorship, and there is no warrant whatever in the Mitakshara for such a general proposition. It has been held in more cases than one that the property which comes to members of an undivided family by devise or gift is not taken by them with benefit of survivorship."

And after preferring to the decision of their Lordships of the Privy Council in *Venkayamma Garu* v. *Venkataramayamma Bahadur Garu* (19) they observed:

"But their Lordships have abstained from laying down that, as a universal rule, a heritage which devolves upon coheirs who happen to be all or some of the members of an undivided family under the Mitakshara is taken by them with benefit of survivorship."

17. (1856) 4 M I A 137. 18. (1904) I L R 27 Mad 300 : 13 M L J 398 (F B)
19. (1902) I L R 25 Mad 678 : 12 M L J 299 (P C)

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Reference has been made by Mr. Alladi Krishnaswami Aiyar to *Chakara Kannan* v. *Kunhi Pokker* (20) which was a case of gift by a person to his wife and children following the Marumakkatayam law and it was held that the donees took the property with the incidents of tarwad property. Here again it is a case where the gift is by a father to his wife and children and even though there was no marriage in the strict sense of the term in Malabar the same intention can be assumed where a father gives property to his wife and children as was assumed in *Nagalingam Pillai* v. *Ramachandra Tevar* (5). Moreover, it would be unsafe to apply to a joint family under the Mitakshara the same principle as would apply to tarwads in Malabar where partition is, except by consent of all parties, impossible.

The view I take is that in cases where the donees are the sons and grandsons and would succeed to the property of the testator in the absence of any testamentary disposition and take the property as ancestral property, the presumption may be drawn, where the will is silent as to the nature of the estate conferred, that they would take it as unobstructed heritage with the same incidents as would follow if there was no will. But where the donees, though members of a joint undivided family, are not related to the testator or, though related to him, would in the absence of any will either immediately or at a later stage take the property as obstructed heritage and only as tenants-in-common, there is no reason for applying the presumption that the testator by devising the property to them intended that there should be a joint tenancy. As pointed out by their Lordships of the Privy Council in *Jogeswar Narain Das* v. *Ram Chund Dutt* (11) which overrules the decision in *Vydinada* v. *Nagammal* (21) the principle of joint tenancy is quite foreign to Hindu Law and that the ordinary rule is that where property is given to two or more persons they take it as tenants in common. It is no doubt true as pointed by Subramania Aiyar, J., in *Yethirajulu Naidu* v *Mukunthu Naidu* (10) gifts may be made to a joint family but I think that unless the gifts are made in such terms as would clearly indicate that the donees should take them as joint family members with the rights of survivorship, the mere fact that the donees are mem-

5. (1901) I L R 24 Mad 429 : 11 M L J 210.
20. (1916) I L R 39 Mad 317 : 29 M L J 48 (F B).
10. (1905) I L R 28 Mad 363 : 15 M L J 299.
11. (1896) I L R 25 Cal 670 : 6 M L J 75 (P C).
21. (1887) I L R 11 Mad 258.

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bers of a joint family ought not to determine that they take it with benefits of survivorship and with all the liabilities of properties which are joint family properties.

I think the decision of the learned Trial Judge is correct and would dismiss the appeals with costs.

*Krishnan, J.*:—The point for decision in these appeals is what estate did plaintiff and his brothers and his father Kathirvelu Mudaliar take in the suit properties under the will of his father's divided brother Kandaswami Mudaliar, Ex. F, was it a joint estate with incidents of joint family property attached to it or did they take each an one-sixth share separately as tenants-in-common?

The decision turns on the words of the will. The will says in paragraph 4 „Items Nos. 4, 5, 6, 7, 8, and 9 under assets in paragraph 1 above, "I bequeath and leave to my brother O. Kathirvelu Mudaliar and sons." It is not denied that under this clause the five sons and their father are joint legatees of the properties mentioned, some of which are the suit properties; it is not argued that the words "and his sons" are mere words of purchase. As the testator was dealing with his self acquisition it is clear that it was open to him to give the properties to Kathirvelu and his sons as joint family property just as it was open to him to give them separate shares in the property. The question is what did he do in this case.

A good deal of argument was addressed to us as to what proper presumption is to be drawn in such a case. It has been held in Madras that where a father gives his self-acquisitions to his sons by a will the proper presumption is that he gave them a joint estate with the incidents of joint family property unless the contrary is clear from the words of the will or otherwise. This was so laid down in *Nagalingam Pillai's Case* (5), and that view has since been followed in this Court. The same view is taken in Calcutta but in Bombay and Allahabad the presumption is held to be in favour of the view that the sons take such property as self-acquired property. This conflict of opinion was brought to the notice of the Privy Council in the recent case of *Lal Ram Singh* v. *Deputy Commissioner of Partabgurh* (1) but while their Lordships set out what they consider the views of the different High Courts to be on page 604 they decided it unnecessary to pronounce on the point. We must therefore follow the Madras view on

1. (1923) I L R 45 All 596 : 47 M L J 260 (P C).
5. (1901) I L R 24 Mad 429 : 11 M L J 210.

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the point. The present case however is not on all fours with the *Nagalingam Pillai's case* (5) as here we have a bequest by a Hindu to his divided brother and his sons and not one by a Hindu father to his sons. The Privy Council point out in page 605 that "the principle upon which it is contended that such property (that is property bequeathed by the father to his sons) should be deemed ancestral is that the son is only getting by his father's will that which, but for the will, he would have received by descent according to the Mitakshara Law." Now this principle obviously cannot apply to the bequest by the divided brother as the legatees will not get the properties by inheritance except for the bequest. The remote contingency of their taking as reversioners does not affect the question.

On the other hand it is argued that in all cases where property is given to more than one person the donees take separately as tenants-in-common and not as joint tenants and reliance is placed on the ruling of the Privy Council in *Jogeshwar Narain Das* v. *Ram Chandra Dutt* (11). No doubt that case lays down that the principle of joint tenancy is quite foreign to Hindu Law and that where property is given to two or more donees they take as tenants-in-common. But as pointed out by Subramania Aiyar, J., in the case of *Yethirajulu Naidu* v. *Mukunthu Naidu* (10) Hindu Law is quite familar with one kind of joint tenancy, namely, the joint holding, by members of an undivided Hindu family. If property is therefore given in terms expressly to a joint Hindu family in my opinion the family would take it with all the incidents of ancestral or joint family property. There is nothing in the Privy Council decision or in the principles laid down by their Lordships contrary to the above veiw. If the gift is to the family, the family will take the property and hold it as other family property and it would not matter who made the gift. The question therefore has to be decided on the words of the will whether the bequest was to the joint family or to the members of it individually in which case they would no doubt take in severalty.

I do not agree with the learned Judge that Kathirvelu and his sons did not constitute a joint family on the ground that they had no property at all. The learned Trial Judge has accepted the argument that the existence of joint property

5. (1901) I L R 24 M 429: 11 M L J 210.
10. (1905) I L R 28 M 365: 15 M L J 299.
11. (1896) I L R 23 C 670: 6 M L J 75 (P C).

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is an essential requisite to constitute a joint family. With respect I am unable to accept this position. Hindus get a joint family status by birth and the joint property is only an adjunct of the joint family. So long as the status continues the family constitutes a joint family. The plaintiff's vakil concedes that even according to his argument the existence of a Chembu or a pot common to all the members is sufficient to constitute a joint family. That shows to my mind the unreal character of the contention. When asked what the position of the family is before it gets joint property, whether it is a divided family or joint family the plaintiff's vakil could not say. According to him the joint family ceases every time when joint property is wholly lost and revives again when any joint property is again acquired. We cannot accept a contention leading to such a position. The possession of joint property is no doubt a normal incident of joint Hindu family but it is not in my opinion a pre-requisite for its constitution. In the passage in Sir Bhashyam Aiyangar's judgment in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (22) quoted by the learned Trial Judge, he was discussing the Mitakshara doctrine of joint family property and not the requisites of a joint family. I have no doubt that Kathirvelu and his sons constituted a joint Hindu family when the will took effect. But it cannot be said that there is anything in the will to show definitely and clearly that the bequest was to the family and not the individual members thereof separately. The ordinary presumption that when there are several joint donees they take as tenants-in-common must therefore prevail. I agree with my learned brother that these appeals fail and must be dismissed with costs.

T. S. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Parvathi Ammal ... *Appellant** (*Petitioner*)

*v.*

K. G. Venkateswara Aiyar and others ... *Respondents* (*Respondents*).

Parvathi Ammal *v.* Venkateswara Aiyar.

*Letters Patent (Madras), cl. 15—Application for leave to file memorandum of objections in* forma pauperis—*Dismissal of—Order if appealable—Exercise of discretion—Interference.*

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*L. P. Appeal No. 54 of 1925. 12th November, 1925.

22. (1901) I L R 25 M 149: 11 M L J 353.

Parvathi Ammal v. Venkateswara Aiyar.

The order of a Judge rejecting an application for leave to file a memorandum of objections in *forma pauperis,* being merely the result of the exercise of discretion on the part of the Judge in a matter which was a proper subject for the exercise of that discretion, should not be interfered with on appeal.

*Quarre.*—If the order amounts to a judgment within the meaning of cl. 15 of the Letters Patent?

Appeal against the order of the Hon'ble Mr. Justice Krishnan dated 11th November, 1924 on C. M. P. No. 3775 of 1924 praying for leave to file a memorandum of objections in *forma pauperis* to appeal No. 116 of 1924 preferred to the High Court against the decree of the Court of the subordinate Judge of South Malabar at Palghat in O. S. No. 21 of 1921.

*C. S. Swaminathan* for appellant.

*P. S. Narayanaswami Aiyar* for respondents.

The Court delivered the following

Waller, J.

JUDGMENTS:—*Waller, J.*:—This is an appeal against an order of Krishnan, J., rejecting an application for leave to file a memorandum of objections in *forma pauperis.* It is argued that no appeal lies against such an order. There are, no doubt, some decisions to that effect, *e. g. Appasami* v. *Somasundara* (1) and *Banno Bibi* v. *Mehdi Hussain* (2). But the former has since been expressly dissented from in *Tuljaram* v. *Alagappa* (3) and the latter proceeded on a *ratio decidendi* which is no longer maintainable. The pronouncement of Sir John Edge in *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee* (4) is also relied on. Speaking for myself, I should welcome any clear cut definition which would render unnecessary, the discussion which is at present almost inevitable whether a particular order does or does not pass the test laid down in *Tuljaram* v. *Alagappa* (3). That test is never particularly easy of application and would be extremely difficult to apply in a case like this. I, however, see no reason to consider the very large question raised by that pronouncement. Assuming that there is a right of appeal against an order like this, I think that we should not interfere. The question is one of the excercise of discretion. That is of course, not the test of non-appealability, but "when the determination complained of is merely the result of the exercise of discretion on the part of the Judge in a matter which was a proper subject for the exercise of that discretion, the appellate Court would rightly decline to interfere." *Desouza* v. *Coles* (5).

1. (1902) I L R 26 Mad 437.
2. (1889) I L R 11 All 375.
3. (1910) I L R 35 M 1 : 21 M L J 1. (F B).
4. (1925) 49 M L J 25 (P C).
5. (1868) 3 M H C R 384.

Parvathi Ammal v. Venkateswara Aiyar. — Waller, J.

Here, the Judge had discretion to admit the application, but he thought fit not to exercise it in the appellant's favour. I think that we should decline to interfere with his order. The appeal is dismissed without costs. One month for paying the necessary fees.

*Devadoss, J.*:—I agree.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Umamaheswara Mudaly and others... *Appellants** (*Defts.*)

*v.*

Muniswami Mudali and others ... *Respondents.*

Umamaheswara Mudaly v. Muniswami Mudaly.

*Partnership—Dissolution—Suit for—Accounts—Moneys drawn by a partner from partnership funds—Interest on—Advances—Interest on—Practice as to—Appeal—Costs of—Successful party when deprived of—Error of Court below due to his omission to place relevant authorities before Court below—Effect.*

In a suit for dissolution of partnership, *held;* that the Court below erred in (1) allowing interest on moneys drawn by a partner from the partnership funds and (2) allowing interest on certain advances up to the date not of the dissolution which, had been effected by the preliminary decree but right to up to the date of final decree.

It is not the practice to allow interest on money drawn by a partner from the partnership funds—be it capital or interest—unless it is so provided in the deed.

Where, owing to the failure of the defendant to direct the mind of the Court below to the clear and conclusive authorities showing the right practice in regard to the above matters, the Court below committed an error in regard to the same; *held,* that, though the defendant succeeded in an appeal from its decree in having the mistakes set right. he was not entitled to the costs of that appeal.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in Original Suit No. 28 of 1919.

*T. R. Ramachandra Aiyar* and *N. S. Rangaswami Aiyangar* for appellants.

*K. S. Krishnaswami Aiyangar* for respondents.

The Judgment of the Court was delivered by

Coutts Trotter, C. J.

*The Chief Justice*:—In this case the learned Judge in making his final decree in a suit for dissolution of partnership has made two errors in taking the accounts. In the first place he has allowed interest on moneys drawn by a partner from the partnership funds—be it capital or interest,

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*Appeal No. 185 of 1923. 25th August, 1925.

it does not matter—a thing which it is not the practice to allow unless it is so provided in the deed. There is clear authority in the case of *Meymott* v. *Meymott* (1). The other thing he has allowed is interest on certain advances up to the date not of the dissolution which had been effected by the preliminary decree but right up to the date of final decree. For that again there is clear English authority, *Barfield* v. *Lough Borough* (2), that such allowances cannot be made. The decree will be amended by disallowing those two items, interest at 9 per cent. being allowed up to the date of the preliminary decree. After that date the usual rate of 6 per cent. interest will be allowed.

With regard to the costs of this appeal, the conduct of the defendants has been extremely foolish and it is probably owing to their foolishness in not coming to Court and not being ready when they ought to have gone on with this case and asking for an adjournment they are responsible in part for the learned Judge going wrong; because, if the two cases cited above had been pointed out to him, undoubtedly he would have directed himself right with regard to this. I do not expect the Subordinate Judge any more than I expect myself to know the exact principles on which such matters are dealt with in a dissolution of partnership and it was clearly the defendants' business to direct the mind of the Court to the authorities which would have shown him the right practice. In these circumstances the appeal will be allowed without costs and the decree will be amended in the way I have indicated.

A. S. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

Chowdanna v. Venkatapathinayain Varu.

Gaddam Chowdanna having died
his legal representative
C. H. Pedda Raju ... *Appellant** (*Defts. L. R.*)

*v.*

K. T. Venkatapathinayain Varu,
late a minor, but now declared major
and guardian on record discharged
(*Vide* order dated 22nd August, 1923
on C. M. P. No. 121 of 1923) ... *Respondent* (*Plaintiff*).

*Inam grant—Nature of—Grant burdened with service—Grant in lieu of wages—Post-settlement grant by Zamindar for personal service to be rendered*

*S A No. 12 of 1923. 7th August, 1925.

1. (1862) 54 E R 1211 : 31 Beav 445. 2. (1872) L R 8 Ch App Cas 1.

Chowdanna v. Venkatapathinayain Varu.

*to Zamindar in future—Resumption—Zamindar's right of—Grantee in possession after resumption—Status of—Trespasser or occupancy ryot—Liability for rent.*

In 1806 the then Zamindar of the Kangundi estate, which was settled in 1797, made a certain inam grant to the defendant's predecessor. The grant was for a service to attend daily on the Zamindar as he performed devotions, etc. There was no evidence that there was any reason for the grant except that the grantee should perform in the future the service enumerated.

*Held*, that the grant was one in lieu of wages and was not a grant burdened with service, and that the Zamindar was entitled to put an end to the service at his pleasure and resume the grant.

*Held further*, that the defendant, who continued in possession even after the Court had held that he was not entitled to resist resumption of the inam, must be deemed to have retained possession not as a trespasser but as an occupancy ryot, and was bound to pay rent for the land in his holding.

Second Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 123 of 1920 preferred against the decree of the Court of the Sub-Collector of Tiruppathur Division in Summary Suit No. 14 of 1925.

*B. Somayya* for appellant.

*K. V. Krishnaswami Aiyar* and *N. Swaminathan* for respondent.

The Court delivered the following

JUDGMENT:—In this case the appellant-defendant was the holder of a certain inam grant given by the Zamindar of Kangundi whose representative is now the plaintiff-respondent, in 1806. Both the Lower Courts have found that this estate was settled in 1797 and consequently this grant to the defendant's predecessor was a post-settlement grant. The only evidence of the nature of the grant is contained in Ex. A which says that it was for a service to attend daily on the Zamindar as he performs devotions, *etc.* This undoubtedly is a personal service to the Zemindar, and the question arises as to whether it is resumable or not. It does not appear to be a grant burdened with service, but rather a grant in lieu of wages, for there is no evidence that there was any reason for the grant except that the grantee should perform in the future the service enumerated. That being so, it has always been held in this Court that the Zemindar is entitled to put an end to such service at his pleasure and resume the grant, and I need only refer to the case in *Vadisapu Appandora* v. *Vyricherla Veerabhadra Raju Bahadur* (1) and *Gajapati Maharaju Garu* v. *Sondi Prahalada Binoyi Ratno* (2). I agree, therefore, with the Lower Courts that the Zemindar was justified in resuming the grant.

1. (1911) 2 M W N 406. 2. (1914) M W N 179.

Chowdanna
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A further contention is then raised that the Zemindar is not entitled to claim rent from the defendant because he is not a ryot within the meaning of the Estates Land Act. This plea was not taken specifically in the written statement, apparently because if successful it involved the result that the defendant being a mere trespasser would be liable to eviction. Now the point is pressed apparently because an ejectment suit would be barred by limitation. However the point has been raised now and must be decided, as it was raised in the trial Court at a late stage. The contention here is that the defendant was originally a landholder and that when the grant was resumed he must be deemed to have continued as a trespasser, for he had never been a ryot. This, however, ignores the condition of affairs at the time of the grant. It is not in evidence whether the grant was of the whole land or only of the melwaram; but it has been held in this Court in *Gajapati Maharaju Garu* v. *Sondi Prahlada Binoyi Ratno* (2) a decision which was followed in *Idulityly Siyyaddi* v. *Sri Raja Viswaswara Nissuka* (3) that a Zemindar is not entitled to eject grantees from the lands as a result of such resumption and that the usual presumption of occupancy right must be raised in their favour. If that is done in this case, it must be presumed that the defendant who is in occupation of the land has a right of permanent occupancy. I think also the same result would be obtained by the ordinary presumption that a person's possession must be ascribed to legal origin rather than to an illegal one. Here the defendant continued in possession even after the Court had held that he was not entitled to resist resumption of the inam. If we apply this ordinary presumption it follows then that defendant must be deemed to have retained possession not as a trespasser but as an occupancy ryot. In whichever way the question is viewed, the result is the same, namely, that the defendant was in occupation as an occupancy ryot. As such, he is bound to pay rent for the land in his holding. The question of what is the right amount of rent has not been discussed in this suit for the defendant has not pleaded that what is demanded is wrong and therefore that does not arise for determination here.

The second appeal is accordingly dismissed with costs.

A. S. V. *Appeal dismissed.*

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2. (1914) M W N 179. 3. (1914) 18 M L T 142.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
PRESENT:—MR. JUSTICE RAMESAM.

Koochu Aiyar *alias* Venkatasubbaier ... *Appellant** (*Deft.*)

*v.*

Vengu Ammal and another ... *Respondents* (*Plaintiff and party Respondent*).

Koochu Aiyar v. Vengu Ammal.

*Succession Certificate Act, S. 16—Effect—Debt—Payment of, before grant of certificate to person really entitled (other than holder of certificate)—If a good defence to suit by certificate-holder.*

Where the debtor has paid the debt before the grant of the succession certificate to the person really entitled to the debt (other than the holder of the certificate), it affords a complete defence to the suit by the certificate-holder. The only effect of S. 16 of the Succession Certificate Act is—if the debt remained unpaid up to the grant of the certificate, the certificate is conclusive and compels the debtor to pay it to the certificate-holder.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in A. S. No. 83 of 1922 (A. S. No. 782 of 1922, District Court, Tinnevelly) preferred against the decree of the Court of the District Munsif of Tinnevelly in O. S. No. 192 of 1921.

*C. V. Ananthakrishna Aiyar* and *K. Venkateswara Aiyar* for appellant.

*K. Rajah Aiyar* and *P. V. Krishnaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The respondents now agree to the second appeal being allowed and they admit that the sucession certificate has been rushed but plead that they are not liable for costs as the decrees in the Courts below were obtained on the footing of the Succession Certificate which was then subsisting.

Mr. Ananthakrishna Aiyar argues that, even on the footing of the succession certificate, he could plead and prove payment before the grant of the certificate to the person lawfully entitled and the decision of the Courts below is wrong. I agree with him. The decisions relied on by the Courts below do not support the view taken by them. In *Damothar Pachapurkar* v. *Zinga Kom Kandlkia* (1) the plea was not that the payment was made to a person (other than the holder of the certificate but) really entitled to collect the debt. Whether it is correctly decided or not, it did not deal with the question arising in this case. In *Muthiah Chettiar* v. *Ramanathan Chettiar* (2) there was no plea of payment to

*S A No. 617 of 1923. 2nd December 1925.

1. (1870) 7 Bom H C R (AC J) 31. 2. (1918) M W N 242.

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another and the sentence relied on is a mere casual observation and was not meant to decide any point arising in the case. In *Meenakshi Achi* v. *Anantanarayana Aiyar* (3) no payment to another was pleaded. The only question was who should continue the suit of the creditor who died during its pendency. The widow produced a succession certificate and claimed to proceed with it. The defendant said that the undivided brother of the deceased was the proper party but he disclaimed any such right. The point arising now did not arise there. On the other hand the case in *Purshotam Mansukh* v. *Ranchhod Purshotam* (4) (a decision of Westropp, C. J., Melvill, Gibbs and West, JJ.) decides that the debtor can show that he paid to the person really entitled to receive though not to the holder of the certificate, before the grant of the certificate. In my opinion this case lays down the correct principle and I agree with it, and hold that where the debtor has paid the debt before the grant of the certificate to the person really entitled to the debt (other than the holder of the certificate), it affords a complete defence to the suit by the certificate-holder. The only effect of S. 16 of the Act is—if the debt remained unpaid up to the grant of the certificate, the certificate is conclusive and compels the debtor to pay it to the certificate holder. See *The Oriental Government Security Life Assurance Company, Ltd.* v. *Vemhedu Amiraju and others* (5).

The District Munsif ought to have made the defendant's wife a party and framed an issue as to the genuineness of the will and then tried the case and the other suit together, instead of this, he made a suggestion which, if not actually absurd, verges on it. The defendant's petition to make his wife a party was dismissed erroneously.

Apart from all this, there is no *bona fides* in the plaintiff's claim. Her main object was to attack the will which has now been found genuine. Her attack against the will was frivolous having regard to the history of the family and of the circumstances under which the will was executed.

The second appeal is allowed and the plaintiff must pay the costs of the appellant in all the three Courts.

A. S. V. *Appeal allowed.*

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3. (1902) 12 M L J 380. 4. (1871) 8 Bom H C R : A C J 152 (F B).
5. (1911) 1 M W N 276.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS AND MR. JUSTICE MADHAVAN NAIR.

Kijanar Sheshappa Shetty ... *Appellant** (*Defendant*)

*v.*

Kijanar Devaraja Shetty ... *Respondent* (*Plaintiff*).

Sheshappa Shetry *v.* Devaraja Shetty

*Aliyasanthana Law—Jains—Marriage expenses of junior member—Liability of ejman to pay—Marriage expenses part of "right to maintenance."*

The marriage expenses of a junior member of a Malabar *tarwad* or *Aliyasanthana* family should be defrayed by the *karnavan* or *ejman* provided that the family has adequate funds and the *karnavan* or *ejman* has no valid and proper objections to the marriage. Such expenses form part of a junior member's "right to maintenance." Case law discussed. ....

The constitution of such families and the rights of junior members thereof discussed.

Second Appeal against the decree of the District Court of South Kanara in A. S. No. 27 of 1922 preferred against the decree of the Court of the District Munsif of Puttur in O. S. No. 679 of 1920.

*B. Sitarama Rao* for appellant.

*K. Y. Adiga* for respondent.

The Court delivered the following

JUDGMENT:—We are invited in this second appeal to set aside a decree by which the Court of appeal below in concurrence with the Court of first instance gave the plaintiff a sum of Rs. 181-9-3 on account of expenses incurred by him for performing his marriage. The plaintiff is a junior member of a family of which the 'ejman' is the defendant. The parties are Jains of South Kanara governed by the Aliyasanthana Law. In reply to the plaintiff's claim, the defendant pleaded that he is not the ejman, that the plaint property is not family property, that the marriage was not arranged or performed with his consent and that, in any event, the ejaman of an Aliyasanthana family is not bound in law to contribute for the marriage expenses of a junior member. The Lower Courts overruled all these pleas. As regards the want of consent alleged by the ejman, it is conceded for the appellant that the Lower Courts should be deemed to have found that the ejaman withheld his consent for the marriage perversely and on no justifiable grounds. In these circumstances, Mr. Sitharama Rao argues that the Lower Court's decree is contrary to law

*S. A. No. 787 of 1923. 2nd November, 1925.

because (1) the law does not recognise the union between a man and woman following the Aliyasanthana law as a valid and binding marriage and (2) this item of expenses should not on any account be included within the rule making maintenance a proper charge on the revenue of the family. The important question for our decision is whether the plaintiff, a junior member of an Aliyasanthana family, is entitled to claim his marriage expenses from the ejaman of the family.

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The Aliyasanthana system is very similar in its incidents to the Marumakkathayam law [see *Subbu Hegadi* v. *Tongu* (1) and *Muthu Amma* v. *Gopalan* (2)]. A karnavan in Malabar is the senior male member of a group of persons, all of them tracing their descent in the female line from a common female ancestor owning joint property under the absolute control and management of the karnavan. This group forms a Marumakkathayam tarwad [see *Kenath Puthen Vittil Shuppu Menon* v. *Narayanan* (3)]. The powers and rights of the karnavan, who corresponds to the ejman of the Aliyasanthana family, have been laid down in various decisions of this Court. Large and absolute though his powers be over the administration of the tarwad property and its funds, the regulation of the tarwad's internal economy, and the protection, control and supervision of the junior members, it should never be forgotten that the tarwad property in his possession is not exclusively his own, but he owns it along with the other members only as a co-proprietor. As observed in *Narayani* v. *Gobinda* (4) "although as a senior member he enjoys special consideration, he has no higher claim in the enjoyment of the income than any other member of the family." The right of ownership is of overwhelming importance to the junior members as it clothes them with very valuable rights which they can enforce against the karnavan. The status of a member of a Malabar tarwad carries with it four distinct rights, *viz.*, (1) a right to be maintained by the karnavan, (2) a right to see that tarwad property is not alienated otherwise than in accordance with law, (3) a right to become the tarwad karnavan, when he becomes the senior male member, and (4) a right to a share if a partition were made and the tarwad broken up by common consent [*Moidin Kuthi* v. *Krishnan* (5) *Ibrayan Kanhi* v. *Komamutti Koya* (6) and *Muthu Amma* v.

1. (1869) 4 M H C R 196. 2. (1912) I L R 36 Mad 593 : 23 M L J 496.
3. (1904) I L R 28 Mad 182 at p 188 : 14 M L J 415. 4. (1884) I L R 7 Mad 352
5. (1887) I L R 10 Mad 322. 6. (1892) I L R 15 Mad 501 : 2 M L J 255

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*Gopalan* (2)]. To these might be added another right, *viz.*, a right to bar an adoption [*Chandu* v. *Subbu* (7)].

Of these rights obviously the most substantial one is the right to "maintenance," as such a right is the mode in which the right of ownership in the tarwad property is most effectively enforced by the junior members. The value of such a right in the case of persons living under a system of law which does not sanction compulsory partition, nor recognises son's claims against the father cannot be overestimated. The nature of this right has been thus described by Seshagiri Aiyar and Bakewell, JJ., in *Ammani Amma* v. *Padmanabha Menon* (8). "The allowance claimed by an anandravan of a Malabar Tarwad or by a junior member of a joint Hindu family is not as a dependent upon the owner of the property, but as one who, in his own right, is entitled to participate in the income. The common law in both cases having vested the management in the senior member, the claim for separate maintenance is an index of proprietorship and not founded upon moral or quasi-legal obligations or inability to maintain himself or herself. ..... It is clear that the right of a member of a tarwad for an allowance is an incident of co-proprietorship in the property of the tarwad and that consequently that right cannot be denied unless circumstances show that the tarwad is not in a position to give a separate allowance." [See *Achutan Nair* v. *Kunjunni Nair* (9); *Maradevi* v. *Pammakka* (10); *Kunhikrishna Menan Karnavan* v. *Kunhikav Ammal* (11) and *Govindan Nair* v. *Kunju Nair* (12)].

The term "maintenance," as has been pointed out, is often loosely applied. In its limited sense, as understood in Malabar, it means the expenses required for food, raiment and oil; in its more comprehensive sense, it includes what is usually called in Malayalam "menchilavu," which is treated as a part of maintenance [see *Govindan Nair* v. *Kunju Nair* (12)]. According to Sundara Aiyar, J., the word "menchilavu" is used to designate a part of what is required for the support of a person and is distinguished from what is strictly necessary for food and raiment. Legally it may be taken to mean part of what would be included in the terms "maintenance" and "necessaries." Sadasiva Aiyar, J., states that "the literal meaning (of the term "menchilavu") seems to

2. (1912) I L R 36 Mad 593 : 23 M L J 496. 7. (1889) I L R 13 Mad 209
8. (1918) I L R 41 Mad 1075 . 35 M L J 509. 9. (1903) 13 M L J 499.
10. (1911) I L R 36 Mad 203 : 22 M L J 309. 11. (1918) 35 M L J 565.
12. (1919) I L R 42 Mad 686 : 36 M L J 565.

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be 'excess expenditure.' " I take it that it means that it is usually allowed beyond what is strictly required for food and clothing alone. Under the expression, therefore, come the sums which are required for keeping up a respectable appearance consistent with the position and dignity of the family to which a person belongs, sums required for a reasonable amount of travelling to holy places in the case of a member of an aristocratic family, *etc.,* for slight convenience and comforts, which though they might be called luxuries when indulged in by a low class individual, would come under the head of "necessaries" in the case of persons belonging to families which cannot be classed with the lower sections of the community." See *Valia Konikkal Edamkelu* v. *Lakshmi Nettyar Ammal* (13). In *Ravanni Achan* v. *Thankunni* (14), Phillips, J., described "menchilavu" as "a luxurious form of maintenance as distinguished from bare maintenance" and stated that "the claim to both must be treated as based on the same footing." Coutts Trotter, J., as he then was, and Kumaraswami Sastri, J., observe that "menchilavu" which has been translated as "maintenance" is said to be indistinguishable from maintenance of the members of a Hindu family." S. A. Nos. 2556 and 2557 of 1912. The loose application of the word, as pointed out above, is due to the fact that the English word "maintenance" is not, strictly speaking, a correct equivalent of the Malayalam word "chilavu" of which it is generally understood to be a translation. The term means "expenses" and is comprehensive in its significance. The right to maintenance is the right to claim one's "expenses" which obviously must be of various kinds.

By the enforcement of this right which, as already mentioned, is given to a member of a Malabar tarwad or an Aliyasanthana family by reason of the proprietary interest possessed by the member in the family property, the junior members have been able to secure legal recognition of their claims not only for the cost of the "bare necessaries of life," but also for the expenses legitimately incurred for "medical treatment" [*Kelu Achan* v. *Umala Achan* (15)], and also for arrears of "menchilavu" (for instance, expenses "for clothes, oil, soup, tea, coffee and confectionary) *Ravanni Achan* v. *Thankunni* (14); see also *Valia Konikkal Edamkelu* v. *Lakshmi Nettyar Ammal* (13) assuming that there are ade-

13. (1913) M W N 379. 14. (1919) I L R 42 Mad 789 : 37 M L J 157.
15. (1912) 17 I C 704.

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quate funds at the disposal of the family. The decision in *Krishnan* v. *Govinda Menon* (16) recognising the obligation of the karnavan to educate the junior member, declared that it was not incumbent on him as part of his duties to "give the junior members education through the medium of the English language or on western lines." Such a claim if made now would, for its decision, as suggested in the judgment itself, depend upon the question whether such a education "has not become essential." In *Neelakanta Thuruvambu* v. *Ananta Narayana Aiyar* (17), it was held that having regard to the circumstances of the family which was a well-to-do one "a contract by a karnavan engaging a tutor for the purpose of teaching the English language on reasonable terms as to remuneration for the members of the family is binding upon the succeeding karnavan and that the debt thus due is payable out of the assets of the family." If all these claims can be recognised as legal, whether they come under the strict designation of "maintenance" or not, the claim for the allowance being based on the junior member's co-proprietorship of the joint family property, we fail to see why the marriage expenses of a junior member of a tarwad or Aliyasanthana family should not also be defrayed by the karnavan or ejaman, provided that the family has adequate funds; and the karnavan or ejman has no valid and proper objections to the marriage.

The junior members of an Aliyasantana family or a Malabar tarwad are not expected to live in a perpetual state of celibacy, and it is not denied that marriage is a necessary incident in the normal life of individuals in Kanara and Malabar as in other parts of the country. It has been held in *Srinivasa Aiyangar* v. *Thiruvenkatathaiengar* (18) and *Gopalan* v. *Venkataraghavadu* (19), that the marriage of a male governed by Mitakshara Law is a necessary burden upon the family. We have been pressed with the argument that as under the Aliyasanthana law union of man and woman is, "in truth, not a marriage but a state of concubinage into which the woman enters of her choice and is at liberty to change when and as often as she pleases." See *Subbu Hagadi* v. *Tongu* (1). There can be no legal obligation on an ejman or a karnavan to defray the expenses of the so-called marriage. In our opinion, this argument has absolutely no bearing on the deci-

16. (1898) 8 M L J 294. 17. (1907) 19 M L J 590.
18. (1912) I L R 38 Mad 556 : 25 M L J 644.
19. (1915) I L R 40 Mad 632 : 29 M L J 710.
1. (1869) 4 M H C R 196.

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sion of this question. The prevailing system of marriage is a well-recognised and time honoured social institution sanctified by the long usages of the society to which the parties belong. The fact that the Courts have refused to consider it as a valid marriage in law is no reason why the family, if it can afford the means, should refuse to defray the expenses for the marriage of a junior member. In our opinion, the marriage expenses of a junior member of a Malabar Tarwad or Aliyasanthana family form a part of his "right to maintenance."

The cases referred to above do not by any means exhaust the variety of expenses for meeting which an anandravan can make a valid claim against the karnavan of the tarwad. It has been held in *Subbu Shettithi* v. *Krishnacharya* (20) though guardedly, that in certain circumstances a karnavan is entitled to raise money on the security of the family property for the defence of the members of the family charged with 'rioting' if the money could not otherwise be procured. The exact legal basis for the liability of the tarwad property is not stated in the judgment; but the observations of Miller and Krishnaswami Aiyar, JJ., in S. A. No. 359 of 1906 an earlier case— that "there is some evidence that some money was borrowed for expenses of the defence of a member of the family who was prosecuted in a criminal case but the nature of the criminal case does not enable us to say that the defence was for a family purpose," would suggest that the question to be decided would be whether the expenditure is for a family purpose though the judgment does not show the exact bearing of the nature of the criminal case on the question of family purpose. In a still earlier case, *i. e.*, S A No.28 of 1888, without referring to the nature of the criminal charge and its connection with the question of family purpose) the available papers do not show what the charge was), Sir Arthur Collins, C. J. and Parker, J., held that "the Lower Court rightly decided that the money borrowed for the purpose of defraying the expenses incurred in a criminal charge against the karnavan and two senior anandravans was a debt incurred for the tarwad purpose and binds the tarwad." In our opinion, the cases discussed above are but illustrations of the rule that the junior member of a Malabar tarwad or Aliyasanthana family is entitled to claim from the karnavan or ejman for his maintenance all his "necessary expenses" the justification for such a demand

20. (1910) 21 M L J 159.

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being his undoubted co-ownership of the tarwad property. Such expenses when defrayed by him would be expenses incurred by the karnavan for tarwad purposes and would bind the tarwad. What expenses are necessary may, in disputed cases, be safely left to the decision of Courts. The principle is thus stated by Sundara Aiyar, J., in his treatise on Malabar Law: "The rule of law is that the anandravan should be allowed for his maintenance what is reasonable and proper having regard to his needs and having regard to the position, affluence and status of the family. What is reasonable and proper will depend upon the circumstances and the times and would be a pure question of fact." There is nothing in the conclusion we have reached, contrary to the principle of the Malabar or Aliyasanthana law.

We are fortified in our conclusion that the junior member is entitled to claim his marriage expenses by the decision in *Parvathi* v. *Kamaran* (21). It was held in that case that in North Malabar the male members of a Nayar tarwad are by custom entitled to receive from the karnavan an allowance for the maintenance of their consorts and children while living in the tarwad house. In the present case the junior member does not pitch his demand so high. He claims only the expenses incurred for the performance of his marriage. It is well known that the Aliyasanthana people in South Kanara have advanced further towards the paternal family than have the Marumakkathayam people in Malabar. It is the recognised practice in South Kanara for the woman and her minor children to live with her husband [see *Subbu Hagadi* v. *Tongu* (1)]. It is a common practice in North Malabar and a growing practice in South Malabar [see *Parvathi* v. *Kamaran* (21), and *Muthu Amma* v. *Gopalan* (2)]. As this decision is based upon the custom in North Malabar which exists in an intensified form in Kanara, it follows that a junior member under the Aliyasanthana system also would be entitled to claim such expenses. If so, his right to claim the *expenses of his marriage* should be undoubted and, as we have shown there is nothing in the principle of Aliyasanthana law against the recognition of such a right.

We are asked not to place much reliance on the decision in *Parvathi* v. *Kamaran* (21) as its authority is alleged to be

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21. (1883) I L R 6 Mad 341. 1. (1869) 4 M H C R 196.
2. (1912) I L R 36 Mad 593 : 23 M L J 496.

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somewhat shaken by the observations of the learned Judges, who decided the case reported in *Pavanni Achan* v. *Thankunni* (14). In that case Phillips and Napier, JJ., held that an anandravan of a Malabar tarwad is not entitled to claim maintenance from his tarwad for his wife, who belongs to another tarwad, and much less is he entitled to claim for her any "menchilavu." The learned Judges think that to allow such a claim put forward by the anandravan would be to uphold the claim of the wife for maintenance from her husband's tarwad and then they refer to *Parvati* v. *Kamaran* (21) and point out that even in that case the proposition contended for was described as inconsistent with the principle of Marumakkathayam law. With due deference, it seems to us that the true significance of the claim advanced on anandravan's behalf has not been correctly appreciated by the learned Judges. By asking for an allowance for the maintenance of his wife the junior male member of a Malabar tarwad is not asking the Court to hold that his wife has a right to recover maintenance from his tarwad. In so doing, he is only asking the Court to give effect to his right to recover from the karnavan expenses for his own maintenance of which "bharyachilavu" (wife's expenses) as it is called in Malabar is a necessary part. As observed in *Muthu Amma* v. *Gopalan* (2) by Sundara Aiyar and Sadasiva Aiyar, JJ., *Parvathi* v. *Kamaran* (21) held that a male member of a Marumakkathayam tarwad is entitled to an allowance for his consort and children living with him, that is, *in computing the amount to which he is entitled for his own maintenance, the fact that he has to maintain a wife and children should be taken into account.* The claim of a junior member of a Malabar tarwad to receive from the karnavan an allowance for the maintenance of his wife and children, though described as inconsistent with the principle of Marumakkathayam law, was still allowed in that case as the custom was found to support such a claim. In our opinion, the effect of the decision in *Parvati* v. *Kamaran* (21) cannot be minimised by the observation "that the finding in that case (as regards custom) based on the evidence of two witnesses was not objected to." This case has been referred to apparently with approval in *Marudevi* v. *Pammakka* (10) and ex-

2. (1912) I L R 36 M 593: 23 M L J 496.
10. (1911) I L R 36 Mad 203 : 22 M L J 309
14. (1919) I L R 42 Mad 789 : 37 M L J 157. 21. (1883) I L R 6 Mad 341

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plained as shown above in *Muthu Amma* v. *Gopalan* (2) and has always been looked upon by the community following these systems of law as enunciating a well-known and correct principle of customary law. In this connection it may be interesting to note the following observations occurring in the Malabar Marriage Commission Report as regards this custom. "But so well established is the custom that the High Court has held that the maintenance of the 'wives' and children of the junior members (residing with their 'husbands' in the husband's tarwad) is a charge which the karnavan of the junior members is bound to meet. The High Court allows that the ruling would seem inconsistent with the principles of Marumakkathayam law, but the answers to the interrogatories and the evidence taken by the commission show that *the ruling is really and truly in accordance with existing usage.*" [The *italics* are are ours].

For the above reasons, we hold that the Lower Court's decree awarding the plaintiff the expenses for his marriage is correct. It has not been argued before us that the amount is excessive. This second appeal is dismissed with costs.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Angadi Mallappa and others .... *Appellants** (*Defendants*)

*v.*

Neelana Gowdra Kare Gowd and another ... *Respondents* (*Plaintiffs*).

Angadi Mallappa v. Neelana Gowdra Kare Gowd.

*Decree—Binding nature of—Death of debtor—Suit against alleged heirs not in possession—Decree not binding on real heirs.*

After the death of a person, his creditors filed a suit against certain persons, whom they alleged to be his heirs and certain others who were impleaded as being in possession of his estate. The former remained *ex parte* while the latter were found to have colluded with the creditors in allowing a decree to be passed. *Held,* the decree obtained was not binding on the real heirs of the debtor. Where a decree is obtained without fraud or collusion against persons in possession of the deceased debtor's estate, it will be binding on the real heirs. but where there is no such possession, a decree obtained against persons alleged to be the heirs of the deceased, however *bona fide* the suit may be, is not binding on the real heirs. Case law discussed.

Second Appeals against the decrees of the Court of the Subordinate Judge of Bellary in A. S. No. 27 of 1924 (A.S.

*S. A. Nos. 198 and 199 of 1925. 1st December, 1925.

2. (1912) I L R 36 Mad : 23 M L J 496.

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No. 39 of 1924 on the file of the District Court of Bellary) and in A. S. No. 28 of 1924 (A. S. No. 40 of 1924 on the file of the District Court of Bellary) respectively, preferred against the decrees of the Court of the District Munsif of Hospet in O. S. Nos. 411 of 1922 and 629 of 1922 respectively.

*V. Govindarajachari* for *A. Krishnaswami Aiyar* for appellants.

*V. S. Narasimhachar* for respondent.

The Court delivered the following

JUDGMENT:—These second appeals arise out of two suits which are connected and similar in nature. The plaintiffs are the same in both the suits and defendants 2 to 13 are the same in both the suits, only the 1st defendant is different. The facts are:—One Linganna Gowd died about the end of 1915 The defendants 2 to 13 of these suits alleging themselves to be the creditors of Kare Gowd, the deceased, in respect of certain promissory notes, filed a suit, O. S. No. 176 of 1916 to recover the amount. In that suit there were 6 defendants. First and second defendants were the sisters of Kare Gowd; the third defendant was the sister's son and defendants 4, 5 and 6 were impleaded as parties on the ground that they were in possession of some of the properties of the deceased. Defendants 1 to 5 never appeared. The sixth defendant alone filed a written statement but he too did not appear at the time of the trial. A decree was given on the notes. Some time after the present plaintiff's filed O. S. No. 697 of 1919 for a declaration that they were the heirs of Linganna Gowd. In that suit the creditors abovementioned and all other persons in possession of the properties of the deceased were made parties and they obtained a decree. The decree-holders in that promissory notes suit began to execute their decree and in execution sales the 1st defendant in each of these suits purchased the properties. There was then a scramble for possession. An order was made sustaining the possession of the 1st defendant in each case and referring the plaintiffs to a regular suit. The present two suits are the consequences of those orders.

One technical objection in S. A. No. 199 of 1925 may be disposed of. That suit originally related only to two items. It was filed within one year of the order maintaining the defendants's possession. The plaintiffs then discovered that they omitted another item. They then applied for amend-

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ment of the plaint which was ordered with the result that the third item to the schedule was added. Even then they did not amend the body of the plaint by putting the number of the execution application relating to that item but otherwise the history of that item is the same as that of items 1 and 2. Above all the application for amendment was not opposed by the defendants. It was ordered without any objection. The effect of that amendment is to date back the suit as no new party is added. In the result the suit is, I think, within time in respect of the three items and this objection fails.

We now come to the main point in this case, which has been elaborately argued by Mr. Govinda Rajachar for the appellant. He contends that the decree in O. S. No. 176 of 1916 having been obtained by him *bona fide* against the two sets of defendants in that suit, the 1st set being believed by him to be the heirs and the second set being persons in possession, the decree is binding on the present plaintiffs who no doubt have since been held to be the actual heirs of Linganna Gowd.

Incidentally I may mention there is a finding of the Subordinate Judge that the decree in O. S. No. 176 of 1916 has been obtained fraudulently and collusively. But on reading the judgment of the Subordinate Judge, his reasons only show that there is collusion between the plaintiff and the 6th defendant. He has not adverted to the case of the 4th and 5th defendants and this has to be settled first before the main question is discussed. As the Subordinate Judge has not discussed this, I think it is open to me to give a finding in second appeal.

The 4th, 5th and 6th defendants are brothers. The plaint in O. S. No. 176 of 1916 alleged that all three were in possession of the properties of Linganna Gowd, that Linganna Gowd died in their house, that they usurped Linganna's properties, and that they said they would discharge the debts of the deceased. In fact, wherever they are mentioned, they are mentioned together. The 4th and 5th defendants did not appear but the 6th defendant only appeared saying that he was appointed guardian under Linganna Gowd's will. Just before the written statement was filed, the plaintiff obtained an injunction against the 6th defendant on the ground that he was trying to alienate the properties. The District Munsif in his finding also says that defendants 4 to 6 were in possession of certain properties, putting them together and without separating them. On these facts it seems to me to

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be plain that defendants 4 to 6 were always acting together and never made a distinction between themselves. Even for appearing in Court they were content that only one of them should appear and even that one did not appear at the trial. If the inference of collusion is justified, I think it applies to all. I would therefore find that the collusion was between the plaintiff and defendants 4, 5 and 6. I do not mean to say that the promissory note was really fabricated as the Subordinate Judge seems to think nor that the suit was filed as a result of collusion. What strikes me is that between the framing of the issues and the trial, the plaintiff seems to have squared up the matter with defendants 4, 5 and 6 and by some arrangement; they were to be absent so that he may get a decree very easily seeing that the other defendants did not appear. To that extent it may be said to be collusive. But beyond this point I am not prepared to go. There is nothing to show that there is any collusion between the plaintiff and defendants 1 to 3 who were not said to be in possession of Linganna Gowd's properties. They were sued only as heirs. The question therefore now reduces itself to this, whether the decree obtained against them on the ground that they were supposed to be the heirs, will now be binding on the real heirs. I do not think it was open to the Courts below to go into the question of the genuineness of the promissory note until this question was decided and I do not think the Subordinate Judge was justified in finding the promissory note as not genuine without deciding the binding nature of the decree. If the decree is binding, he cannot go into the question of the genuineness of the promissory note. If the decree is not binding, it is unnecessary. Mr. Govindarajachar relied on *Gnanambal Ammal* v. *Veeraswami Chetty* (1) to show that the decree is binding on the present plaintiffs. In that case the illegitimate son of the deceased was in possession. Sadasiva Aiyar, J., who was one of the Judges who decided it, explained it in *Bachu Soorayya* v. *Toomuloori Chinna Anjaneyalu* (2). As so explained, it seems to me that the *ratio decidendi* of that decision is that where the decree is against the person in possession of the deceased's estate, it is binding on the real heir but where there is no such possession, however *bona fide* the suit, the decree is not binding on the real heir. The actual decision in *Bachu Soorayya* v. *Toomuloori Chinna Anjaneyalu* (2) is against the appellant. Another decision

1. (1915) 29 M L J 698. 2. (1918) 36 M L J 106.

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relied upon by the appellant is *Ramaswami Chettiar* v. *Oppilamani Chetti* (3). This was a case in which a wrong legal representative was brought on record in execution. On that ground I think this case does not help the appellant. I entirely agree with the observations of Sadasiva Aiyar, J. in *Bachu Soorayya* v. *Toomuloori Chinna Anjaneyalu* (2), where he says that all cases in which the defendant died pending the suit and a wrong representative was brought on record or cases of death pending execution are irrelevant for considering the point in that case, where the suit itself was filed against a wrong person. This is also the view of Bhashyam Aiyangar, J. in *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar* (4). In that case he observes that the decisions cited by the Lower Courts were cases of suits being filed against a wrong person and therefore they had no bearing on the case before him which was that of a defendant dying after suit. The cases he so eliminated are those pertinent for our purpose now. One of these is *Subbanna* v. *Venkatakrishnan* (5). That is directly against the appellant and it has never been disapproved. It is referred to with approval in *Manchharam* v. *Kalidas* (6) and I see no reason to dissent from it. However honest or *bona fide* a person's belief may be in bringing such a suit, the danger of allowing it to bind the real heir lies in this consideration, namely, that however false or unjust the suit may be, where the defendant is neither in possession nor an heir, there is really nobody interested in defending the suit. The *argumentum ab inconveniendi* in the case of an honest plaintiff unable to find the real heir ought not to make us oblivious of this danger. I think the honest plaintiff should rather suffer rather than a judgment obtained by dishonest person bind the heirs who were never parties to the suit. This view was also held in *Shaik Abdulla Saiba* v. *Haji Abdulla and another* (7) where only one heir was sued. It was held there that it was open to the other heirs to redeem the mortgage. In *Ambashankar Harprasad* v. *Sayad Ali Rasul* (8) a money decree was obtained only against one of the heirs and it was held that the decree binds only that heir and the property in possession of that heir. This view was also taken in *Jafri Begam* v. *Amir Muhammad Khan* (9) though it was also held that the heirs

2. (1918) 36 M L J 106. 4. (1902) I L R 26 M 230: 12 M L J 368.
3. (1909) I L R 33 M 6.
5. (1888) I L R 11 M 408. 6. (1894) I L R 19 Bom 821.
7. (1880) I L R 5 Bom 8. 8. (1894) I L R 19 Bom 273.
9. (1885) I L R 7 All 822 (F B).

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who were not parties could not recover possession of the property without paying their share of the debts. The last three cases are cases of Muhammadan heirs and are not consistent with the decisions in *Muttyjan* v. *Ahmed Ally* (10) and *Khurshetbibi* v. *Keso Vinayak* (11) where it was said that a suit against one of several Muhammadan heirs must be regarded as an administrative suit and binds others. It is true it is difficult to reconcile all these cases, as observed by Bashyam Aiyanger, J., in *Kadir Mohideen Marakkayar* v *Muthukrishna Aiyar* (4). But I prefer the former class. The decision in *Kaliappan Servaikaran* v. *Varadarajulu* (12) is also against the appellant but I do not want to rely upon it as it seems to go too far and is inconsistent with *Gnanambal Ammal* v. *Veeraswami Chetty* (1) and would seem to decide that a decree obtained even against a person in possession would not bind the real heir, a position which I am not prepared to accept and which does not arise in the present case. The cases in *Sotish Chunder Lahiry* v. *Nil Comul Lahiry* (13) and *Hari Sara Moitra* v. *Bhubaneswari Debi* (14) are peculiar as in those cases there was an adoption after the suit divesting the widow and they do not help us. The decision of the Privy Council in *The General Manager of Raj Durbhunga* v. *Maharajah of Coomar Ramaput Singh* (15) was very much referred to in many of these cases. The head note shows that the original debtor was sued as defendant and he died after suit. Bhashyam Aiyangar, J., observed in *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar* (4) that the facts of the report did not support the head-note. The second sentence in the report "they had both taken out execution of their decrees after his death" shows that the head-note is right. Therefore on that ground it has been considered by Sadasiva Aiyar, J., in *Bachu Soorayya* v. *Toomuloori Chinna Anjeneyalu* (2) as distinguishable. I think it is also distinguishable on the ground pointed out by Turner, C. J., in *Siva Baghiam* v. *Palani Padiachi* (16) namely, the son denied that he was the legal representative on the ground of his adoption and afterwards turned round and contended that the decree against the

1. (1916) 29 M L J 698. 2. (1918) 36 M L J 106.
10. (1882) I L R 8 Cal 370.
13. (1884) I L R 11 Cal 45. 14. (1888) I L R 16 Cal 30 (P C)
15. (1872) 14 M I A 605. 16. (1882) I L R 4 Mad 40.
4. (1902) I L R 26 Mad 230: 12 M L J 368. 11. (1887) I L R 12 Bom 101.
12. (1909) I L R 33 Mad 75 : 19 M L J 659.

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widow is not binding on him because his adoption turned out to be invalid. It was held that such a contention ought not to be allowed. The following cases cited by Mr. Narasimhachari I think are also against the appellant *Premraj* v *Javarmal* (17) *Baswantapa Shidapa* v. *Ramu and Malkhana* (18), *Ashi Bhusan Dasi* v. *Pelaram Mondel* (19) and *Tanguturi Jaganadhan* v. *Seshagiri Rao* (20). Though *Madavarayudu* v. *Subbamma* (21) is a case of the death of the defendants after suit, it also helps the respondent as this would be an *afortiori* case; for it was held there that even an honest belief does not allow the bringing in of the wrong representative after suit, a point which it is not necessary for me to decide The decision in *Srinivasa Aiyangar* v. *Kanthimathi Amma* (22) follows *Kaliappan Servaikaran* v. *Varadarajulu* (12) and is subject to the same observations I have made about the latter case.

For all these reasons I think the contention of the appellant must be disallowed and the Second Appeals dismissed with costs.

T. S. V. *Appeals dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

T. R. Ramaswami Aiyangar ... *Appellant** (*Respondent*)

*v.*

The Official Receiver of Coimbatore ... *Respondent* (*Petitioner*).

Ramaswami Aiyangar v. Official Receiver.

*Provincial Insolvency Act, Ss. 53, 54—Mortgage by insolvent—Validity against Official Receiver—Mortgage to discharge prior debts and for cash payment—Cash payment inserted merely to screen insolvents' estate from creditors—Discharge by mortgagee of some of prior debts—Document intended to defeat and delay creditors—Effect—Mortgage held void as such under S. 53—Mortgagee's rights with regard to secured and unsecured debts discharged by him.*

The appeal was against an order setting aside a mortgage in favour of the appellant under S. 53 of the Provincial Insolvency Act on a petition by a petitioning creditor, dated 12th July. 1920. That very alienation by mortgage was held to be an act of insolvency and adjudication followed thereon. The mortgage was dated 10th April 1920, and was for Rs. 6,000, and the consideration was four prior debts of a total sum of Rs. 2,500, which the mortgagee

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*A A O No. 176 of 1923. 7th December, 1925.

17. (1912) 15 Bom L R 41.
18. (1884) I L R 9 Bom 86.
19. (1913) 18 C W N 173.
20. (1916) 20 M L T 479.
21. (1916) 31 M L J 222.
22. (1909) I L R 33 M 465.
12. (1909) I L R 33 M 75: 19 M L J 659.

undertook to discharge, and a cash payment of Rs. 3,500. The four debts mentioned in the document were genuine debts, and two of them, amounting to a sum of Rs. 1,000, were paid off by the mortgagee, one being a simple money debt, and the other a mortgage debt. Rs. 3,500 stated to have been paid in cash was in fact not paid, and the object of inserting the same in the document was found to be to secrete that money for the insolvent's benefit. The dominant intention underlying the document was found to be, not that of cheating the other creditors of the insolvent by preferring the creditors of the four prior debts, but that of deceiving and defrauding the creditors of the insolvent by secreting a large part of the insolvent's estate from his creditors.

*Held,* that the mortgage was not bad as a fraudulent preference under S. 54 of the Act, but that it was void as such against the Official Receiver under S. 53 of that Act.

*Held,* however. that the appellant should be allowed to rank in the schedule of secured creditors to the extent of the amount paid by him to discharge the prior mortgage, and as an unsecured creditor to the extent of the amount paid by him to discharge the unsecured debts.

*Per Wallace, J.*:—To attract the operation of S. 53 of the Provincial Insolvency Act, it is not necessary that the document should be to defeat or delay creditors. It is sufficient if it was a transfer not in good faith or not for valuable consideration. Though the appellant paid valuable consideration to the extent of Rs. 1,000, yet, as the intention of the document was to secrete a much larger part of the insolvent's estate from his creditors, it must be held to be a transfer taken not in good faith within the meaning of the section.

Appeal against the order of the District Court of Coimbatore dated 25th October 1922 and made in S. A. No. 163 of 1921 in I. P. No. 17 of 1920.

*C. S. Venkatachariar* for appellant.

*T. M. Krishnaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENTS:—*Wallace, J.*:—This is an appeal against the order of the Lower Court setting aside a mortgage in favour of the appellant under S. 53 of the Provincial Insolvency Act on a petition by a petitioning creditor dated 12th July, 1920. This very alienation by mortgage was held to be an act of insolvency and adjudication followed thereon. The mortgage was dated 10th April, 1920 and was for Rs. 6,000, and the consideration was four prior debts of a total sum of Rs. 2,500, which the mortgagee undertook to discharge, and a cash payment of Rs. 3,500. It is found by the learned Judge, and it is not disputed here, that two of the debts amounting to Rs. 1,000 were genuine and were paid by the mortgagee. The Judge holds that the Rs. 3,500 cash was never paid. He records no clear finding as to the nature of the document, viewing it at one time as a sham and at another time as a fraudulent preference. He has set it aside in *toto.* Wallace, J.

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Wallace, J.

The first point for consideration is whether the Rs. 3,500 cash was paid. I agree with the Lower Court that the appellant, on whom the onus lay, has not proved the payment. There are various suspicious circumstances. The document recites that the money was paid in cash on the date of the document, and the evidence of the appellants, witnesses P. W's 1, 2 and 3 is that the whole sum was paid at once 35 notes of Rs. 100 each—but the appellant himself deposed that he got Rs. 3,500 by cashing a Rs. 10,000 hundi at the Bank of P. W. 4. The bank books, however, show that only Rs. 3,100 was paid to the appellant on the date of the document, and the balance not till the next day so that, the appellant's account of how he got the full sum of Rs. 3,500 to pay the whole amount on the date of the document is not true. Further, although the document was not registered until 31st May, 1920, no separate voucher was taken from the insolvent for the Rs.3,500. Nevertheless the appellant handed over the document to the insolvent for registration. He has claimed that it was in his own possession up till the day of registration and filed Ex. V to support his statement. But, as the District Judge has shown, a good deal of suspicion attaches to Ex. V and it has been in fact not proved by the writer of it. Further the appellant says that he noted the payment of Rs. 3,500 in his diary and accounts. He has produced neither of these documents. Also he did not obtain any encumbrance certificate, while, as a matter of fact, there was an undischarged prior encumbrance on the property. The appellant is a banker and is used to dealing cautiously on the applications for money, and usually in the case of his own bank demands, collateral security for all advances. It is very difficult to believe that he would have parted with a sum of Rs. 3,500 in such a careless fashion. I am not, therefore, prepared to differ from the learned Judge in holding that the Rs. 3,500 was not paid. It is further clear from the evidence of the appellant and that of the insolvent that the appellant was aware that the insolvents were in financial straits. Under this mortgage the latter disposed of all their property, and, along with the prior mortgage on the property, the property, was mortgaged up to the hilt. I think the proper conclusion is that this Rs. 3,500 was not paid and that the object of inserting the same in the document was to secrete this money for the insolvent's benefit. The four debts mentioned in the document are genuine debts and two of these were paid. The appellant says that he refrained from paying the other two because the insolvency petition was presented.

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Wallace, J.

I have now to consider the effect of these findings. I do not think that it can be concluded that the insolvent had the dominent idea of cheating his other creditors by preferring the creditors of these four debts. It is thus not properly a case of fraudulent preference under S. 54 of the Provincial Insolvency Act, but I think it can be got under S. 53. As already pointed out the District Judge has held this mortgage to be the act of insolvency and the adjudication was based on this conclusion. That adjudication is not now before us and I take it that this finding stands, namely, that the document is one got up by the insolvents to repeal and delay creditors, of whom the petitioning creditor was one. The alienee in such circumstances no doubt is faced with this handicap: that it is not open to him to attack that finding, but on the other hand, to attract the operation of S. 53 of the Provincial Insolvency Act, it is not in terms necessary that the document should be to defeat or delay creditors. It is sufficient if it was a transfer not in good faith or not for valuable consideration. It is open therefore to the alienee to escape the operation of the section by showing good faith and payment of valuable consideration. Now, this alienee has paid valuable consideration to the extent of Rs. 1,000; but considering that the intention of the document was to secrete a much larger part of the insolvent's estate from his creditors it is impossible to hold that the mere payment of Rs. 1,000 will avail to make the document one taken in good faith. A document cannot be partly in good faith and partly not. The dominant intention underlying the document is what has to be looked at, and, in this case, that intention was to deceive and defraud creditors. It is therefore a document taken not in good faith and liable to be declared void against the Official Receiver. There is therefore no reason to disturb the order of the District Court setting it aside.

The appellant contends that, even so, he is entitled to stand in the shoes of the creditors whose debts he has discharged. One of these was a simple money debt and the other was a mortgage debt. We have been referred to certain rulings under S. 53 of the Transfer of Property Act. In *Chidambaram Chettiar* v. *Sami Aiyar* (1) it was held that a transfer to defeat creditors is wholly void even if it is in part for valuable consideration and that it cannot be upheld even to the extent to which it is supported by consideration. But the upholding contended for and negatived in that case was

1. (1906) I L R 30 M 6: 16 M L J 427.

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Wallace, J.

an upholding as an assignment. In *Palamalai Mudaliar* v. *The South Indian Export Company* (2), after a mortgage had been paid off, the alienee was given a charge on the property to the extent of the payment: and the same principle was acted upon in *Chinna Pitchiah* v. *Pedakotiah* (3), *Loorthi Odayar* v. *Gopalaswami Aiyar* (4) and *Rajani Kumar Das* v. *Gana Kishore Shaha* (5). The general principle applicable to cases under S. 53 of the Provincial Insolvency Act, I think, is this: the assignment, as an assignment, void; but, for money genuinely paid in discharge of genuine debts, the alienee will stand in the shoes of these whom he has paid. In the case of a mortgage debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment. Consequently, I think the proper method of disposal by the Official Receiver is that the appellant should be allowed to rank in the schedule of secured creditors to the extent of the amount paid by him to discharge the mortgage, and as an unsecured creditor to the extent of the amount paid by him to discharge the unsecured debts; and I would direct that this be done.

I would give the appellant roughly proportionate costs on his success and direct that he receive one-third of the costs throughout and pay two-thirds of the costs throughout.

Madhavan Nair, J.

*Madhavan Nair, J.*:—I entirely agree. The learned District Judge has held that the alienation in favour of the appellant should be set aside under S. 53 of the Provincial Insolvency Act, but he has also found that the appellant has paid a sum of Rs. 1,000 thereby discharging two prior debts of the insolvent, namely, (1) Rs. 500 due to one Sinnakkal under a mortgage, Ex. II, and, (2) Rs. 500 due to the Bank under Ex. III. I agree with my learned brother that the evidence in the case fully supports these conclusions. It is argued that the sum of Rs. 1,000 having been paid, the alienation in favour of the appellant should be upheld at least to the extent it is supported by consideration, and in this connection, some decisions under S. 53 of the Transfer of Property Act dealing with transfers made with intent to defeat or delay creditors were referred to in the course of the argument. In *Chidambaram Chettiar* v. *Sami Aiyar* (1) [confirmed by the

1. (1906) I L R 30 M 6: 16 M L J 327.
2. (1909) I L R 33 M 334: 20 M L J 211.
3. (1911) I L R 36 Mad. 29.
4. (1923) 46 M L J 125.
5. (1908) I L R 35 C 1051.

Ramaswami Aiyangar *v.* Official Receiver.

Madhavan Nair, J.

Privy Council in *Chidambaram Chettiar v. Srinivasa Sastrial* (6)] it was held that a transfer intended to defeat creditors is wholly void as an assignment though it is in part supported by valuable consideration; but this does not mean that the alienee is not to get any credit for the debt that he may be found to have actually discharged. In *Palamalai Mudaliar v. The South Indian Export Company* (2) an alienee who paid a portion of the consideration by discharging a valid mortgage previously binding on the property alienated was given a charge on the property to the extent of his payment. This principle is recognised in *Loorthi Odayar v. Gopalaswami Aiyar* (4) though this decision covers a wider ground. Applying the principle of these decisions, I think that though the assignment as an assignment is void under S. 53 of the Provincial Insolvency Act, the alienee is entitled in so far as he has paid off the mortgage debt due to Sinnakkal to rank in the schedule of secured creditors to the extent of payment; and, in so far as he has paid off the debt due to the Bank, to rank as an unsecured creditor. I agree with my learned brother that the Official Receiver should be directed to dispose of the claims of the appellant as regards these two debts on this basis. I also concur in the proposed order as to costs.

A. S. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Sethu and others ... *Appellants** (*Respondents in S. A. No.* 1115 *of* 1921 *on the file of the High Court—Defdts.* 1 *to* 4)

*v.*

Palani *alias Thirumeni Thevan... Respondent* (*Appellant in do.—Plaintiff*).

Sethu *v.* Thirumeni Thevan.

*Evidence Act, S.* 112—*Legitimacy—Presumption—Woman—Divorce by first husband—Re-marriage with another a month later—Birth of son to her during continuance of second marriage—Legitimacy of son.*

Plaintiff's mother, *P.* was first married to one *S* in September or October 1903. She was divorced by him in May or June 1904. She married again one *T* a month later. The plaintiff was born to her in September 1904 during the continuance of the valid marriage between her and *T.* The question was whether the plaintiff could be regarded as the legitimate son of *T.* There was

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*L P Appeal No. 27 of 1924. 20th October, 1925.

6. (1914) I L R 37 M 227: 26 M L J 473 (P C).

2. (1909) I L R 33 M 334: 20 M L J 211.

4. (1923) 46 M L J 125.

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no proof that T had no access to P at any time the plaintiff could have been begotten. On the contrary, there was evidence that T was carrying on an intrigue with P at the time when the plaintiff could have been begotten.

*Held,* that on the language of S. 112 of the Evidence Act. the plaintiff must be regarded as the legitimate son of T.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Krishnan, dated 7th March, 1924, in S. A. No. 1115 of 1921 preferred to the High Court against the decree of the Court of the Subordinate Judge of Madura in A. S. No. 40 of 1920 (A. S. No. 32 of 1920 on the file of the District Court, Madura) preferred against the decree of the Court of the First Additional District Munsif of Madura in O. S. No. 124 of 1919 (O. S. No. 25 of 1918 on the file of the Court of the Principal District Munsif of Madura).

*L. A. Govindaraghava Aiyar* and *P. S. Narayanaswami Aiyar* for appellants.

*K. V. Krishnaswami Aiyar* for respondent.

The Court delivered the following

Devadoss, J.

JUDGMENTS:—*Devadoss, J.*:—This appeal raises a novel question. The plaintiff's mother Pechiammal was first married to one Subramania Thevan in September or October, 1903, who divorced her in May or June, 1904. She married again one Thirumeni Thevan in June or July, 1904. The plaintiff was born to her in September, 1904. The plaintiff sues for partition of his one-third share in the property of Thirumeni Thevan. The District Munsif held that the plaintiff was the son of Thirumeni Thevan and passed a preliminary decree in his favour. The Subordinate Judge reversed the decree of the District Munsif holding that the plaintiff was not the legitimate son of Thirumeni Thevan. Mr. Justice Krishnan set aside the decree of the Subordinate Judge and restored that of the District Munsif holding that the plaintiff was the son of Thirumeni Thevan. There is evidence in the case to show that Pechiammal did not live with her first husband for any length of time but carried on an intrigue with Thirumeni Thevan in consequence of which there were criminal proceedings and Subramania Thevan divorced her on account of her conduct. There is also evidence that Thirumeni Thevan treated the plaintiff as his son and that at the time the plaintiff could have been conceived, his mother was having criminal intimacy with Thirumeni Thevan.

The question in this case turns upon the construction of S. 112 of the Indian Evidence Act. Under S. 112, if a per-

son is born during the continuance of a valid marriage between his mother and any man or within 280 days after the dissolution the mother remaining unmarried, he shall be considered to be the son of his mother's husband unless it could be shown that the husband had no access to his mother at any time when he could have been begotten. If a person is born during wedlock, the law says it is conclusive proof that he is the legitimate son of the husband of his mother, and the onus of proving that the husband had no access to the mother at any time he could have been begotten is upon the husband. In this case, complication is introduced by the mother marrying again. If the plaintiff's mother had not married Thirumeni Thevan, the plaintiff would be considered to be the son of Subramania Thevan, and the onus would be upon Subramania Thevan or any other who challenges his paternity to prove that he was not begotten by Subramania Thevan. But the plaintiff's mother married Thirumeni Thevan when she was *encente* and the plaintiff was born during the subsistence of a valid marriage between his mother and Thirumeni Thevan. According to S. 112, the plaintiff is the son of Thirumeni Thevan, and unless and until it is proved that Thirumeni Thevan had no access to Pechiammal, the plaintiff's mother, at any time he could have been begotten, the onus is on those who challenge his paternity. There is no proof in this case that Thirumeni Thevan had not access to the plaintiff's mother at the time he could have been begotten. On the other hand, the evidence shows that Thirumeni Thevan was carrying on an intrigue with Pechiammal at the time when the plaintiff could have been begotten.

The argument of Mr. Govindaraghava Aiyar is that, according to Hindu Law, there are only two classes of sons. Aurasa and Dattaka sons, and to import S. 112 of the Evidence Act into the region of Hindu Law would be giving S. 112 the force of substantive law overriding the principles of Hindu Law. The Evidence Act was enacted for the purpose of enabling the Courts to act upon relevant evidence and to come to a conclusion on such evidence. In order to enable the Court to decide matters satisfactorily, the law of evidence requires the Court to raise certain presumptions and S. 112 raises one of those presumptions, and the presumption is a rebuttable one, and until it is rebutted it should be considered conclusive proof. Before considering whether S. 112 has made an inroad into the Hindu Law or not, it is necessary to consider whether the parties to this case are persons who are

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governed by the Code of Manu. No doubt the Courts have acted upon on the general presumption that the Hindu Law applies to all persons who are not Christians, Mahomedans or persons professing any distinctive faith. Hindu Law, strictly so called, cannot be applied to some of the castes in this Presidency. According to Hindu Law there can be no divorce and there can be no re-marriage of widows. But according to the custom prevailing among the Maravars in Southern India, a man can divorce his wife at any time he likes and a divorced woman as well as a widow could validly re-marry; and the children of such re-marriage are legitimate and inherit to their parents. It is therefore difficult to see how S. 112 can be said to militate against or override any of the principles of the Hindu Law. Even according to Manu's Code, the plaintiff would be considered the legitimate son of Thirumeni Thevan. S. 173 of Chapter IX is in these terms; if one marries a preganant young woman, whether pregnancy be known or unknown, the male child in her womb belongs to the bridegroom and is called the son received with the bride. It might be said that this rule applies only to virgins. But whether it applies to virgins or to divorced women or to widows, Manu did recognise the fact that pregnant woman could be validly married and the child who was *enventre samere* at the time of the marriage was the child of the husband. In Manu's time the levirate was prevalent. *Vide* Ch. IX, S. 167. In Manu's time re-marriage of widows was prevalent though many condemned it. When the re-marriage of a widow or a divorced woman is valid according to the law of the parties, it cannot be said that the rule which says that a person born during the subsistence of a valid marriage shall be considered to be the son of the husband is opposed to the Hindu Law. Mr. Govindaraghava Aiyar for the appellant relied upon several English cases, *Birthwhistle* v. *Vardill* (1), *The King* v. *Luffe* (2). These cases have no application to the question to be decided in this case. According to the Law of Scotland, the marriage between a man and a woman legitimises their issue born before marriage. But the Law of England does not recognise any person as legitimate who is not born during lawful wedlock or within 280 days of the dissolution of marriage either by death or by a decree of Court. The Hindu Law is the same in this respect as the English Law.

1. (1826) 2 Cl & Fin 571: 6 E R 1270: 108 E R 163.
2. (1807) 103 E R 316: 8 East 193.

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[*Collector of Trichinopoly* v. *Lakkammani and others* (3)]. On the grounds of public policy under the English Law a person born during the lawful wedlock is held to be legitimate, and the onus of proving that he is illegitimate is on the person who asserts it. The question as it has arisen in this case has not arisen in any English case. Sir James Stephen in his Book on Evidence says that he is not aware of any decided case on the point. Taylor in his Treatise on Evidence at page 349 refers to an American case. Mr. Govindaraghava Aiyar relied upon the rule in French Code and also upon the Roman Law on the point. I think it is unnecessary to consider what the rule is in other systems of law about the legitimacy of a person. According to the Indian Evidence Act, all that is necessary to show that a person is legitimate is that he was born either during wedlock or within 280 days of dissolution of the marriage. In this case there is no question of illegitimacy at all. If Thirumeni Thevan had not married Pechiammal the plaintiff would be the legitimate son of Subramania Thevan. Thirumeni Thevan having married her he becomes the legitimate son of Thirumeni Thevan. The law no doubt leaves to Thirumeni Thevan or any other person who challenges his paternity to prove that Thirumeni Thevan had not access to the plaintiff's mother at any time he could have been begotten. In the case of *Ingestre* v. *Attorney-General* (4) this question arose: "In that case the petitioner's mother was twice married. She had left her first husband in 1881, and on 16th May, 1882, he presented a petition for divorce, a decree *nisi* was pronounced on 10th December, 1881, and was made absolute on 20th June, 1882. A day or two afterwards she married her second husband with whom she had co-habited since she left her first husband, and the petitioner was born on 8th September, 1882. The evidence satisfied the Court that he was the son of the second husband, and the question of law then arose whether he was the legitimate son of his father, for although he was born in wedlock he was conceived at a time when his parents could not lawfully have been married." Sir Samuel Evans, President of the Probate Division, answered the question in the affirmative. We have not been able to get at the report of this case, but the case is discussed in 30 Law Quarterly Review page 153. The facts in that case are very similar to the present and though the judgment in the case is not before us the conclusion arrived at by the learned President of

3. (1874) 1 I A 292 at 293. 4. The Times, Oct. 14. 1913.

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the Probate Division is in conformity with S. 112 of the Indian Evidence Act.

The decision in *Rahi and others* v. *Govind Valad Teja* (5) has no application to the present case. In that case, the question was whether a person was the illegitimate son of his father when his mother was not kept continuously by the father. As I have already observed, there is no question of illegtimacy in this case. Either the plaintiff is the legitimate son of Subramania Thevan or the legitimate son of Thirumeni Thevan. If his mother had not married Thirumeni Thevan, the plaintiff would be considered the legitimate son of Subramania Thevan. The words of the section have to be given their proper meaning. The legislature intended that if the mother married again, the child born during the subsistence of the second marriage would be considered to be the child of the man whom the mother married again. Without going into the public policy of the law enacted in S. 112 it is sufficient to say that, if a person is born during lawful wedlock, he is the son of the husband of his mother. It is open to those who say that the plaintiff is not the son of Thirumeni Thevan to prove that Thirumeni Thevan could not have had access to Pechi Ammal at any time when the plaintiff could have been begotten. If a man marries a woman not knowing that she is pregnant, he could, by showing that he could not have had access to the woman when the pregnancy commenced, make out that the child is not his. But if a person knowing that a woman is pregnant marries her, the child of the woman though born immediately after the marriage becomes in law his child unless the man proves that he had no access to the woman when he could have been begotten. The plaintiff therefore is the son of Thirumeni Thevan and is entitled to a share of his properties.

In the result the appeal is dismissed with costs.

Waller, J.

*Waller, J.*:—This appeal raises a question under S. 112 of the Indian Evidence Act. The facts found are these. Plaintiff's mother was married to one Subramania Thevan in October, 1903. She was divorced in June, 1904 and married Therumeni Thevan a month later. In September plaintiff was born to her. The question is whether, on these facts, plaintiff is to be regarded as the legitimate son of Thirumeni Thevan. The District Munsif thought that he should be so regarded. The Subordinate Judge held that he was the

5. (1875) I L R 1 Bom 97.

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legitimate son of the first husband. Krishnan, J., agreed with the District Munsif.

On the language of S. 112, I think Krishnan, J., is right. Plaintiff was born during the continuance of a valid marriage between the mother and Thirumeni Thevan and there is no proof of non-access during the material period. The argument contra is that a child conceived during adulterous intercourse can never become legitimate even though the parents have been validly married before its birth. That was at one time the view of English lawyers and it appears to be still the law in France. In English Law, where as a concession, a child conceived before marriage as the result of a non-adulterous connection was regarded as legitimate if born after the marriage of its parents, the concession was based on a fiction which dated back the marriage to the conception. The fiction now, of course is not applicable to the fruit of an adulterous connection, for the parents could not lawfully have married at the time of conception. That, however, is not the law of India as stated in S. 112 of the Evidence Act. Nor is it the present law of England vide *Ingestre* v. *The Attorney-General* (4) a case of which we have got no report, but which is commented on in an article in 30 Law Quarterly. Mr. Govindaraghava Aiyar argues that it is opposed to Hindu Law but the Privy Council in *Collector of Trichinopoly* v. *Lakkamani and others* (3) decided that the English and Hindu Law do not differ in such matter. An Indian Case has been referred to *Nicholas* v. *Asphar* (6). There the first husband died in November, 1841. The widow married again in December, 1841 and gave birth to a daughter in April 1842. The learned Judge found that the daughter was the legitimate daughter of the first husband. No doubt she was born within 280 days after the first husband's death, but the section requires that the widow should not have married. If she does, the presumption is that the child is the legitimate child of the second husband. No doubt, that presumption can be rebutted by proof of his non-access during the material period. If such proof be forthcoming another presumption would arise that the child was the legitimate off spring of the first husband. But with great respect, I do not think that the learned Judge stated the law correctly when he said that "the presumption of legitimacy arising from conception during a valid subsisting

3. (1874) 1 I A 292 at 293. 6. (1896) I L R 24 C 216.

4. Times, 1913, Oct. 14—See 30 Law Quarterly Review p. 153.

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marriage is conclusive." The date of birth and not that of conception is the test. In the case of a dissolution not only must the birth be within 280 days but the widow should further not have remarried. I agree that the appeal should be dismissed with costs.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Pedda Sanjivi Reddy and another... *Appellants** (*Plaintiffs*)

*v.*

Kondagari Koneri Reddi ... *Respondent* (*Defendant*)

Sanjivi Reddy v. Koneri Reddy.

*Malicious prosecution—Suit for damages for—Maintainability—Criminal Procedure Code, S. 107—Petition for taking action under—Suit in respect of—Defamation—Absolute privilege—Plea of—Maintainability—Criminal Procedure Code, S. 107—Petition for taking action under—Imputations in—Petition forwarded by Magistrate to Police for investigation—Investigation by Police—Statements made in course of—Claim for damages for defamation in respect of both classes of statements—Maintainability.*

The defendant presented a petition to a Deputy Magistrate praying that the plaintiffs and some others should be bound over under S. 107, Criminal Procedure Code. The Magistrate on receipt of the petition sent it to the police for enquiry and report. The police reported, after enquiry and after hearing what the petitioner had to say, that there was no foundation for the allegations in the petition. Thereupon the Magistrate dismissed it and refused to take any action under S. 107 Criminal Procedure Code.

In a suit brought by the plaintiffs claiming damages for malicious prosecution and for defamation in respect of the false and malicious accusations and imputations made by the defendant in the criminal complaint filed by him in the Court of the Deputy Magistrate and repeated by him in a statement made by him to the Sub-Inspector of Police to whom the Deputy Magistrate referred the complaint for investigation, *held,* that the claim for malicious prosecution was unsustainable because the plaintiffs had not in fact been prosecuted.

*Held further,* that the claim for defamation was also unsustainable, because the plea of absolute privilege prevailed both with respect to the statements made to the Sub-Inspector of Police and with respect to those contained in the petition to the Magistrate.

All statements made by a potential witness as a preliminary to going into the witness-box are equally privileged with the statements made when actually in the box in Court. The statements made to the police-officer which could only be made with a view to their being repeated on oath before the Magistrate were therefore absolutely privileged.

By the common law of England absolute privilege attaches not merely to the actual proceedings of any tribunal exercising judicial function. but to all preliminary steps which are in accordance with the cognised and reasonable procedure of such a tribunal. That principle must be held to obtain in India also.

*Appeal No. 356 of 1924. 6th October, 1925.

Sanjivi Reddy *v.* Koneri Reddy.

Coutts Trotter, C. J.

Appeal against the decree of the District Court of Bellary in O. S. No. 53 of 1923.

*Sir K. V. Reddi* and *P. V. Rangaram* for appellants.

*S. Ranganatha Aiyar* for respondent.

The Court delivered the following

JUDGMENTS:—*The Chief Justice*:—The plaintiffs in this case brought a suit claiming damages for malicious prosecution and for defamation. The defendant presented a petition to the Deputy Magistrate of Adoni praying that the plaintiffs and some others should be bound over under S. 107 of the Criminal Procedure Code. The Magistrate on receipt of the petition sent it to the police for enquiry and report. The police reported, after enquiry and after hearing what the petitioner had to say, that there was no foundation for the allegations in the petition. Thereupon the Magistrate dismissed it and refused to take any action under S. 107, Criminal Procedure Code. This Civil suit is the outcome of those proceedings.

No difficulty arises with regard to the claim for malicious prosecution. The short and sufficient answer to such a claim is that the plaintiffs were not in fact prosecuted. But the claim for defamation raises a question of some little importance.

A Code like the Criminal Procedure Code which purports to provide for every conceivable situation labours under at least one disadvantage and that is that it is difficult, if not impossible, to argue by analogy and to extend the principle to be found in one class of cases with which it deals to another I make no question but that it is against the general principles of the Code that action should lie for statements made in circumstances such as the present. But unfortunately while the Code contains definite provisions as to certain statements the effect of which is to make them absolutely privileged it can hardly be said to have provided for statements such as those. Indeed contention for the plaintiffs is that the present occasion cannot be brought within the words of the Code at all. The difficulty in the present case is created by the wording of S. 202, Criminal Procedure Code, the section which authorises a Magistrate to refer a matter for investigation to a police officer taken in conjunction with the 'definition of 'complaint' contained in S. 4 (1-*h*). In the latter section 'complaint' is defined as "the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown,

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has committed an offence" and S. 202 which gives the Magistrate the power to refer a matter for investigation by a police officer is in term restricted by defining the occasion on which he may so act by the word "on receipt of a complaint of an offence of which he is authorised to make cognizance." It is argued that as a petition under S. 107 does not allege the commission of an offence but merely the apprehension that an offence may be committed, the Magistrate has no jurisdiction to order a police investigation. From this it would follow that the investigation is one not authorised by the Code and it is said to follow that the statements made on such an occasion cannot be supposed to be absolutely privileged. It is further pointed out that, on the principle of *expressum facit cessare tacitum* where the Code indicates that absolute privilege should attach to statements, it has done so by implication under S. 161. That section makes a person interrogated by a police officer making an investigation bound to answer all questions relating to the case put to him by the Police Officer. Unfortunately the investigation dealt with by S. 161 is limited to an investigation made under Chapter XIV of the Code which relates to information as to the commission of a cognizable offence. I have already stated that this was not a case of an offence at all but merely a threatened or contemplated offence. The argument is thus two-fold first that the Magistrate had no jurisdiction to refer the case for investigation at all, and secondly, that even if he had, as the information did not relate to the commission of an offence, the witness was under no necessity to answer questions put to him and therefore absolute privilege cannot attach to such answers. It was not disputed at the bar that if the witness were compellable to answer questions absolute privilege would attach to his answers, nor was it disputed that qualified privilege might be held to attach to the statements made in this case. That, however, would not help the respondent here as there were allegations of malice which were not gone into by the learned Judge which would have invalidated any claim to qualified privilege. With regard to the statements alleged to have been made to the police officer, I do not feel any great difficulty. It is, I think, possible to argue that the words of S. 154 at the opening of Chap. XIV, "Every information relating to the commission of a cognizable offence" may be held to cover information relating to the threatened commission of a cognizable offence which, of course, would cover the present case where the suggestion was that the petitioner's life was in danger. But I prefer to put it on an-

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other and wider ground. In *Watson* v. *Mcewan* (1), the House of Lords decided that the absolute privilege which attaches to a witness in the box also attaches to statements made by him for the purpose of his being examined in the box. In that case one of the statements on which it was sought to be found the action was made to the solicitor for the purpose of taking the witness's proof and might have been held to be covered by the professional privilege of the solicitor. But another of the statements was made not to a professional lawyer but to a layman, the husband of the plaintiff, in reference to proceedings for a separation which were pending between them. But the House of Lords did not proceed on the ground of professional privilege at all but on the ground of the privilege of a witness. Lord Halsbury says at p. 487, "It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove." I take that as clearly implying that all statements made by a potential witness as a preliminary to going into the witness-box are equally privileged with the statements made when actually in the box in Court. And the compiler of the head-note took the same view because he states, "The privilege which protects a witness from an action of slander in respect of his evidence in the box also protects him against the consequence of statements made to the client and solicitor in preparing the proof for trial." I am therefore of opinion that the statements made to the police officer which could only be made with a view to their being repeated on oath before the Magistrate were absolutely privileged. It would in my opinion have been much better if the Code had contained a general power to Magistrates to refer any matter brought to their notice for investigation to a police officer without confining it to Chapter XIV. Petitions under S. 107 are habitually referred for investigation by Magistrates which is a great safeguard to the subject, and no class of cases requires more security from the very nature of the allegations made. An allegation not that a man has committed an offence but that he contemplates committing one can obviously be made much more recklessly than an allegation that he has in fact committed an offence which is a much more tangible subject of investigation. I think it will be well that the Code should be revised

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1. (1905) A C 480.

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and that express provision should be made conferring power in terms upon Magistrate to refer petitions under S. 107 for investigation. It is quite true that there is a ruling recorded in Weir's Criminal Rulings, Vol. II, page 51, (Criminal Revision Case No. 132 of 1891) that there is no irregularity in a Magistrate calling for a report from a Magistrate and a police officer must be in the same position before taking action under S. 107. But I think it would be well if the matter were finally settled by an express statutory direction.

With regard to the statements in the petition presented to the Magistrate, it is clear that such a document is contemplated by S. 107 (1) as part of the regular machinery of the section. Its wording is "whenever a Magistrate of the class described in the section is informed that any person is likely to commit any breach of the peace" and it is clear that the petition would fall within the information contemplated by the section. If so, it would clearly be invested by the common law of England with absolute privilege which attaches not merely to the actual proceedings of any tribunal exercising judicial function, but to all preliminary steps which are in accordance with the cognised and reasonable procedure of such a tribunal. This was laid down by Lord Holt, C. J. in 1700 in the case of *Dr. Grivenvelt* v. *Dr. Burwell and others* (2). I am of opinion that that priniciple which is absolutely necessary for the administration of justice must be held to obtain in India also. The learned Judge was therefore right in non-suiting the plaintiffs, and this appeal must be dismissed with costs.

Viswanatha Sastri, J.

*Viswanatha Sastri, J.*:—Appeal by plaintiffs against the decree of the District Court Bellary in Original Suit No. 53 of 1923.

The suit was for the recovery of Rs. 5,000 being the damages sustained by plaintiffs by reason of certain "false and malicious accusations and imputations" made by defendant in a "criminal complaint filed" by him in the Court of the Deputy Magistrate, Adoni, on 28th June, 1923. These "accusations and imputations" were repeated in a statement made by the defendant to the Sub-Inspector of Police, Aspari, on 21st July, 1923, to whom the Deputy Magistrate had referred the complaint, for investigation. Defendant admitted the filing of the "petition" and contended that "it cannot be deemed to be a complaint"; that the filing of it did not amount to a "pro-

1. (1700) 1 Ld Raymond 454.

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secution;" that consequently plaintiffs had "no cause of action to sue for damages for malicious prosecution"; that no such suit lay in respect of "statements made to the Police Officer in the course of the enquiry" and that the statements were not made "maliciously and without reasonable and probable cause"; but "in good faith, *bona fide,* for good reasons and for the protection of his (defendant's) own interest." On these pleadings the Trial Judge joined the following issues:—

1. Were the allegations absolutely privileged?

2. Was there any prosecution such as would entitle the plaintiff to damages, if it were proved to be malicious and based on false allegations?

No evidence was received, and the learned Trial Judge after considering the law came to the conclusion that no action can be taken by the plaintiffs for damages for defamation in respect of allegations made by the defendant, in his complaint to the Magistrate or in his statement to the police. He also held that as "there was no prosecution" but only "an attempt at prosecution no suit for damages for malicious prosecution can lie". These findings are impeached in appeal.

The petition of 28th June, 1923, presented to the Deputy Magistrate, Adoni, is not printed, but the allegation said to have been made in it are detailed in paragraph 5 of the plaint. The petition was one praying for action under S. 107 of the Criminal Procedure Code, and as it was dismissed without issuing any notice to the plaintiff, there was no prosecution of plaintiffs and consequently no action for damages for malicious prosecution would lie.

On the question whether an action for damages for defamation would lie on the basis of the petition, the contention of the defendant was one of absolute privilege. *In re Muthuswami Naidu* (3) a bench of this Court following *Golap Jan* v. *Bholanath Khettry* (4) held, that a defamatory statement in a complaint to a Magistrate was absolutely privileged. But it was contended on behalf of the appellants that a petition to a Magistrate to take action under S. 107 of the Criminal Procedure Code was not a complaint within the meaning of the term as defined in S. 4, cl. (*h*) of the said Code; and that consequently no claim to absolute privilege can be made, with respect to accusations and imputations made therein. A "complaint" as defined in the Code is an "allegation made orally or in writing to a Magistrate with a view to his taking action

3. (1912) I L R 37 M 110. 4. (1911) I L R 38 C 880.

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Viswanatha Sastri, J.

under the Code that some person ..........has committed an offence." It is argued that no offence was committed by the defendant, and that consequently the petition could not be deemed to be a "complaint." It is open to a person whose personal safety is threatened, to apply to a Magistrate for protection and one of the ways of affording protection is by taking security under S. 107 of the Criminal Procedure Code. The petition put in by defendant initiated a proceeding; and in *in re Muthusami Naidu* (3) the learned Judges observe "we do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceedings." I may here state that the words used in the plaint are "The defendant filed a criminal complaint in the Court of *etc. etc. etc.*" In my opinion, therefore, the plea of absolute privilege will prevail, with respect to the petition presented to the Deputy Magistrate.

The question whether there is any such privilege in the case of the statement made to the Sub-Inspector of Police on 21st July, 1923 is not free from difficulty in the face of the ruling of Seshagiri Aiyar, J. in *in re Kakumara Anjaneyulu* (5) to the effect that "the rule of law that parties before the Court are absolutely privileged cannot be extended to the case of complaints to a police constable." In that case the question of privilege arose in a prosecution under S. 499 Indian Penal Code, and not as here in a civil action for defamation, and in *Chunni Lal* v. *Nar Singh Das* (6) a Bench of five Judges held that "the Civil and the Criminal Law and procedure.....are independent of each other," and that as "there was no statute in India dealing with civil liability for defamation "the rule of equity justice and good conscience" had to be applied. The same view has been taken by a Special Bench of five Judges of the Calcutta High Court in *Satis Chandra Chakravarthi* v. *Ram Doyal De* (7). At page 426 it is stated that "the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England."

In the case before us, the petition presented to the Deputy Magistrate was sent by him to the Police for investigation, and so far as my experience goes, this is usually done. Such a course is authorised under S. 202 of the Criminal Procedure

3. (1912) I L R 37 M 110.
5. (1916) 35 I C 813.
6. (1917) I L R 40 A 341 (F B).
7. (1920) I L R 48 C 388 (F B).

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Code, when a Magistrate receives "a complaint of an offence of which he is authorised to take cognizance." But a contention is raised to the effect that as there was no complaint of an offence of which the Magistrate was authorised to take cognizance, he had no authority to order Police investigation and that the statement to the Sub-Inspector of Police was therefore made to an Officer who had no authority to hold any investigation. S. 107 of the Criminal Procedure Code appears in Part IV which is headed "Prevention of offences." The prevention of offences is a part of the administrative machinery for maintaining "Law and Order," and this task is laid on Magistrates. These Magistrates have control over the Police, whose assistance they can seek in the discharge of their duties. Such being the case it appears to me that it is perfectly open to a Magistrate who is asked to set in motion S. 107 of the Criminal Procedure Code, to avail himself of the help which is available to him under S. 202, Criminal Procedure Code; when complaint of an offence of which he is authorised to take cognizance is made to him. In this view I am fortified by the ruling reported in Weir's Criminal Rulings, Vol. II, page 51. In that case the report was no doubt called for from a Subordinate Magistrate, but this can make no difference. In Halsbury's Laws of England (Edition of 1911), Vol. XVIII, S. 1254 it is stated that "the privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in Judicial Proceedings." In the footnote reference is made to *Watson* v. *Jones* (1), where it was held "the the public policy which renders the protection of witnesses necessary for the administration of justice necessarily involves that which is a step towards, and is part of the administration of Justice, namely the preliminary examination of witnesses to find out what they can prove, and that consequently statements made by a witness to a litigant or his solicitor in preparing proof are absolutely privileged." I am therefore of opinion that apart from S. 202 of the Criminal Procedure Code, it was competent to the Deputy Magistrate, Adoni, to have referred the matter to the Police for investigation, and that the Sub-Inspector of Police, Aspari, was entitled to hold the investigation and having presented the petition, it was the duty of the defendant to assist in the investigation. It was said that such wide privileges would have disastrous consequences on innocent citizens, who would be left without redress. But it will always be open to such persons to put Ss. 182 and 211,

1. (1905) A C 480.

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Indian Penal Code in motion by an application under S. 195, Criminal Procedure Code.

I would therefore dismiss the Appeal with costs.

A. S. V. *Appeal dismissed.*

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## [FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

Ramabhadra Thevar and others...*Appellants** (*Defts.* 1 *to* 3).

*v.*

Arunachalam Pillai and another...*Respondents* (*Plaintiffs* 1 and 2).

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Ramabhadra Thevar v. Arunachalam Pillai.

*Transfer of Property Act, S. 84—Deposit—Nature of—Refusal by mortgagee to accept—Withdrawal by mortgagor—Effect of—Interest—Liability to pay.*

A deposit of money by the mortgagor in Court under S. 84 of the Transfer of Property Act is only a special kind of tender, designed to make available a sure mode of proof of the fact of tender. Where the mortgagee refuses to accept the amount and thereupon the mortgagor withdraws the amount, his liability to pay interest depends on the question whether, notwithstanding the withdrawal he remained ready and willing to pay throughout. The better opinion seems to be that the fact of tender raises the presumption that the debtor continued ready and willing to pay and the burden is cast on the mortgagee to show that the mortgagor was either unwilling or unable to pay because he had utilised the money for other purposes. The fact of withdrawal itself may in certain circumstances be some evidence of unwillingness to pay.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 183 of 1922.

*K. S. Krishnaswami Aiyangar* for appellants.

*N. S. Srinivasa Aiyar* and *S. V. Narayana Aiyar* for respondents.

The Court (Phillips and Odgers, JJ.) † made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Phillips, J.

*Phillips, J.*:—The first point for consideration is the construction of the mortgage deed executed by the father of the defendants Nos. 1 to 3 in favour of the 1st plaintiff's manager, 4th defendant. The 1st plaintiff on his own behalf and on behalf of his minor son, 2nd plaintiff, sold certain property to the father of 1st defendant under Ex. 1 on 11th September, 1909. There was a prior mortgage on this property, dated

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*Appeal No. 226 of 1924. 20th, 21st, 30th October, 1925 and 15th January, 1926

9th February, 1908. As there was this prior mortgage and also because one of the vendors was a minor, the 1st defendant's father did not pay the whole of the purchase money, but retained a sum of Rs. 4,625. On the 15th September, 1909 the 1st defendant's father hypothecated the property he bought for this amount and stipulated that the 1st plaintiff should execute a security bond for Rs. 6,000 on or before the 14th September, 1910. The relevant provisions in this mortgage deed which we have to construe are as follows:—

"I shall pay the aforesaid amount of principal together with the interest..........as soon as you execute and get registered before the 14th September, 1910, a security bond in respect of immoveable properties estimated by the mediators at Rs. 6,000...............If security is not given before the said stipulated date, I shall, up to the date on which the security is given, add interest on principal and interest on interest at the said rate with twelve months' rests and pay you the amount of principal and interest accruing due......"

The Lower Court has held, and I think rightly held, that the execution of this security bond was a condition precedent to the demand for the mortgage money and that therefore this suit for the money is not maintainable because the security bond had not been executed, but as the parties came to an agreement during the suit that the mortgage should be adjusted by means of this suit and that the suit should not be dismissed, the Lower Court proceeded with the trial and held that there was no obligation on the 1st plaintiff to execute a security bond on any particular date and that therefore the mortgagor must pay compound interest on the amount of the mortgage from September, 1910, because the deposit made in Court was not a valid deposit, being conditional. This conclusion is somewhat inconsistent with the finding that the execution of the security bond was a condition precedent to the enforcement of the mortgagee's right, and it is now contended for the appellant that the 1st plaintiff was bound to execute the security bond after the date fixed therefor, namely, 14th September, 1910, and that therefore when the mortgagor deposited the mortgage amount coupled with a request for the execution of the security bond it was a valid tender under S. 83 of the Transfer of Property Act, although it was coupled with this condition. The question therefore for determination is whether the mortgagee was under an obligation to execute the security bond, an obligation which can be enforced by the 1st defendant. To adopt the interpretation put upon the document by the Lower Court is to hold that the mortgage is irredeemable except at the option of the mortgagee, and this would constitute a clog on

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the equity of redemption which cannot be enforced. Consequently, if the language is ambiguous, I think that we must adopt an interpretation which would remove that clog. The document itself is an extraordinary document because it provides that on default by the mortgagee the mortgagor is to be penalised, and similarly if the mortgagee fulfils his bargain and the mortgagor commits default, the mortgagee is to be penalised by the compound interest being reduced to simple interest. However this may be, I think it is undoubted that there was an obligation on the mortgagee to execute this security bond, and consequently that obligation could be enforced by the other party to the contract. He was therefore entitled to demand a security bond before paying the money, and the execution of the security bond was not left to the will of the mortgagee to perform at any time he chose. If that is the correct view, the deposit of the mortgage money coupled with a request for the security bond is not a deposit coupled with a condition outside the contract for the condition was one enforceable under the contract. The deposit was therefore a valid deposit under S. 83.

There remains then the question whether the mortgage money ceases to bear interest from the date of deposit under the terms of S. 84 of the Transfer of Property Act. Notice of the deposit was sent to the plaintiff, but he refused to accept the money and subsequently the 1st defendant withdrew the amount from Court. On similar facts it was held in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) that interest did not cease to run, the ground for the decision being that the deposit must be left in Court in case the mortgagee changes his mind. This decision is somewhat at variance with the decision in *Velayuda Nayakar* v. *Hyder Hussan Khan Sahib* (2), where it was held that once a tender had been made and refused, interest ceases to run, although in that case the money had been taken back from the mortgagor by the lender after refusal by the mortgagee. The decision in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) was considered in *Thevaraya Reddy* v. *Venkatachala Pandithan* (3) where Ayling and Tyabji, JJ. differed. The case went up in appeal and was decided in *Thevaraya Reddy* v. *Venkatachala Pandithan* (4). I was one of the members of that Bench and dissented from the decision in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), and apparently Abdur Rahim, Offg. C. J., was

1. (1910) I L R 35 M 44.
2. (1909) I L R 33 M 100: 19 M L J 648.
3. (1914) 1 L W 595.
4. (1916) I L R 40 M 804: 31 M L J 548.

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inclined to the same view, although he held that it was not necessary to decide the point. On the other hand Seshagiri Aiyar, J., was of opinion that *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) was rightly decided. The question has been considered in *Hukam Singh* v. *Babu Lal* (5), and there a Bench of that Court followed my judgment in *Thevaraya Reddy* v. *Venkatachala Pandithan* (4), and accepted the reasoning therein. I have very little to add to my judgment in that case, but I will add a few words regarding the decision in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), from which I venture to differ. In the judgment in that case the question was asked whether when the mortgagor had deposited the money and issued a notice to the mortgagee he had not done all that has to be done by him to enable the mortgagee to take the amount out of Court; and can he then withdraw the money even before the mortgagee appears to claim it? The answer was given in the negative; and a further question was asked why should he be at liberty to do so because the mortgagee appears and refuses to take it? The answer I would give to that question is that the mortgagee is under a duty to take the money when tendered and the cessation of interest on his refusal is a penalty for not performing his duty of submitting to redemption. A mortgagor might be able to collect the mortgage money and interest accrued to date of deposit, but unable to raise any more to meet further interest. Is he to be compelled either to forego his undoubted right to redeem, or else to leave his money lying idle, until the mortgagor chooses or is compelled to accept it? In the case of an usufructuary mortgage the injustice to the mortgagor is obvious as he is deprived of the benefit of his property and of his money. One consideration which appears to have escaped the notice of the learned Judges in that case is that if the mortgagor leaves his money in Court deposit after refusal by the mortgagee it might lapse to Government before the amount is withdrawn: who, in that case, is to bear the loss, the mortgagor or the mortgagee? In the present case the deposit was made in 1913 and this suit was not brought until 1922. If, therefore, the 1st defendant had left the money in deposit, the money woud long ago have lapsed to Government. S. 84 is very clear and says that interest shall cease when once the mortgagor has done all that he can to enable the mortgagee to

1. (1910) I L R 35 M 44.

4. (1916) I L R 40 M 804: 31 M L J 548.

5. (1921) I L R 44 A 198.

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draw the money. When a mortgagee has received notice that the money is actually in Court and that he can draw it at that time, what more can be done by the mortgagor to enable him to draw it? Proceeding strictly on the interpretation of the section I still adhere to my opinion that *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) is wrong and I am inclined to think that the legislature did not intend to make the law in India identical with the law in England. In England when a tender has been made it is also necessary that the mortgagor should always be ready to pay the amount, but the burden of proving that he is not so ready is on the mortgagee. I take it therefore that, when there has been a tender and there is no evidence of any subsequent refusal to pay, the provisions of the English Law would be complied with, and the tender would be valid, except perhaps in cases where it was shown that the tenderer had subsequently derived profit from the money tendered.

As the question is one of some importance and there is a divergence of views in this Court, I think that the question should be referred for decision to a Full Bench. Accordingly the appeal is submitted to a Full Bench for decision.

The Memorandum of Objections is dismissed with costs.

Odgers, J.

*Odgers, J.*:—This was a suit for an amount due on a mortgage or in default of payment for sale. The 1st plaintiff and 4th defendant were brothers. The 2nd plaintiff was son of 1st plaintiff and a minor at the date of suit. Defendants 1 to 3 were brothers and undivided. In 1909 1st plaintiff and 4th defendant sold some of their family properties to the father of defendants 1 to 3, and for the protection of the minor (2nd plaintiff) a mortgage bond, Ex. A, was executed by the father of defendants 1 to 3 to the 4th defendant as head of his family. On a partition between 4th defendant and 1st plaintiff, the amount of the bond fell to share of plaintiffs 1 and 2. Two questions are raised in appeal to us (*a*) that the Subordinate Judge's construction of Ex. A was wrong, (*b*) that interest on Ex. A ceased by reason of a deposit by defendants 1 to 3 in Court under the terms of S. 83, Transfer of Property Act. By Ex. A the mortgagor undertook to repay "as soon as you execute and get registered before 14th September, 1910, a security bond in respect of immoveable properties estimated by the mediators at Rs.6,000 in order that no disputes might arise in the matter of the said sale pro-

1. (1910) I L R 35 M 44.

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perties since there are included therein the properties given as security under a deed executed for Rs. 400 by you and your younger brother Arunachalam Pillai for and on behalf of the said minor Govindaswami also on 9th February, 1908, to Peruvalandan Papavinasam Aiyangar, and get this back with endorsement of payment made thereon." The document proceeds "If security is not given before the said stipulated date, I shall, up to the date on which the security is given, add interest on principal and interest on interest at the said rate with twelve months' rests and pay you the amount of principal and interest accruing due in that manner, and take this back with endorsement of payment made hereon." Security was not furnished by the date named. The Subordinate Judge found that the delivery of the security bond to defendants was a condition precedent to the plaintiffs' claim to the mortgage money and was prepared to hold that the suit was not maintainable owing to the failure of the plaintiffs to execute and deliver security bond according to the covenant in Ex. A. The minor, however, having attained majority offered at the trial to recognize the mortgage as binding on him and to receive the amount due thereon and the Subordinate Judge "owing to the good sense displayed by both parties" proceeded to settle all questions arising on Ex. A and decided that the deposit made by the defendant being conditional was invalid and that interest consequently did not cease to run. He gave a decree for plaintiffs for amount claimed subject to the deduction of the amount paid by defendants 1 to 3 to satisfy Papavinasam Aiyangar's decree (which had been obtained since the date of Ex. A) which has now been agreed at Rs. 865 plus costs and 6 per cent interest. Under the circumstances it is perhaps unfortunate that the Subordinate Judge did not act on his first inclination and dismiss the suit. The clause as to the furnishing of the security bond seems to be clearly a clog on the equity of redemption as the mortgage money cannot be claimed without such bond and no time is provided within which (after 14th September, 1910) such security bond is to be furnished and compound interest is to run "up to the date on which the security is given." Therefore interest is to run on for any length of time until the mortgagee thinks fit to render himself competent to accept it by executing the security bond. This appears to render the clause invalid. The minor has, however, become a major and has offered to accept mortgage money. The real question is therefore the second, the question as to the deposit. On 6th August, 1913, the father of defendants 1

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to 3 deposited the necessary amount in Court and tendered it to 4th defendant who however refused to take it out, whereupon the Court referred the father of defendants 1 to 3 to a regular suit by its order, dated 15th November, 1913. The Subordinate Judge held that the tender was not unconditional because defendants 1 to 3 requested that 4th defendant should first furnish security as provided for in Ex. A before he drew the money. The Subordinate Judge holds that the condition is against the terms of Ex. A. This I am unable to understand as the money can clearly not be taken by the mortgagee unless and until a security bond is provided as stated in Ex. A. I do not see how under the circumstances this can be regarded as a conditional deposit so as to render the deposit invalid. The main question argued before us however was as to the consequent cessation of interest for another reason, viz., that although defendants made a deposit and kept the money in Court for about a year, they subsequently withdrew it. This is a pure question of law on which there is some apparent conflict of opinion.

Section 84, Transfer of Property Act, reads as follows:—

"When the mortgagor or such other person as aforesaid has tendered or deposited in Court under S. 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be,"

the relevant words to the present case being in the last clause.

In *Velayuda Nayakar* v. *Hyder Hussan Khan Sahib* (2), a case of tender, the Court held that "tender" does not imply that the tenderer must always be ready to pay and that the cases to the contrary in English Law and in Calcutta did not apply. There does not appear to be any distinction drawn in the section between tender and deposit. In *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), a case of deposit, it was held that a continuance of the deposit was necessary to obtain the benefit of the section. The English cases as to the necessity for continued readiness to pay in the case of tender were relied on and the case in *Velayuda Nayakar* v. *Hyder Hussan Khan Sahib* (2), distinguished on the ground that there was there no allegation of a subsequent demand by the mortgagee for the amount and that mortgagor failed to pay and also because the matter was clearer as regards deposit as distinguished from tender. "We cannot speak of a person having deposited in Court if he has withdrawn his deposit."

1. (1910) I L R 35 M 44. 2. (1909) I L R 33 M 100: 19 M L J 648.

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In *Thevaraya Reddy* v. *Venkatachala Pandithan* (3), a case heard by Ayling and Tyabji, JJ., there were disputes among the mortgagee's representatives, and the money deposited was not taken out for a year after which the mortgagors withdrew it. Ayling, J., thought that *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), governed the case and that the ruling should be sustained in the absence of a reference to a Full Bench. Tyabji, J., on the other hand, thought the ruling in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), was wrong and that *Velayudha Nayakar* v. *Hyder Hussan Khan Sahib* (2), was the correct view on the ground that it was not shown that the English differed from the Indian Law and that the English Law makes a tender perfect and complete unless the party impeaching its completeness shows an absence of readiness to pay. He examined the English Law and added that the facts in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), and in the case before him were different. On this difference of opinion a Letters Patent appeal was taken and the decision is reported in *Thevaraya Reddy* v. *Venkatachala Pandithan* (4). It was heard by a Bench of three Judges of whom my learned brother was one. Abdur Rahim, Offg. C. J., held that the interpretation of S. 84 in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) was that "The deposit in order to be effective under S. 84 must remain in Court until the mortgagee or his successor in interest has been enabled or is in a position to withdraw it." Seshagiri Aiyar, J., held that *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) was rightly decided. Phillips, J., on the other hand thought that this decision was wrong. He said "the cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered and this penalty is not remitted because he changes his mind when it is too late." The learned Judges, however, held that, in the case before them, the circumstances were different and as the mortgagors failed to have the deposit in Court sufficiently long to enable the mortgagees to draw the amount they failed to do all they had to do under the section. This opinion of Phillips, J., in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) has recently been approved by the Allahabad High Court in *Hukam Singh* v. *Babu Lal* (5). The English Law

1. (1910) I L R 35 M 44.
2. (1909) I L R 33 M 100: 19 M L J 648.
3. (1914) 1 L W 595.
4. (1916) I L R 40 M 804 : 31 M L J 548.
5. (1921) I L R 44 A 198.

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is set forth *inter alia* in *Bank of New South Wales* v. *O'Connor* (6).

In Fisher on Mortgages (6th Edition), S. 1851, it is stated that "interest will cease to run upon the mortgage debt from the time at which a proper tender of the whole amount is shown to have been made. But it ought to appear, that, from the time of the tender, the money was kept ready by the mortgagor, and that no profit was afterwards made of it; upon proof of the contrary whereof the interest will still run." The principle in English Law being apparently that if the mortgagor was to have the benefit of cessation of interest on the mortgage, he must not have earned interest on the money elsewhere in the meantime.

In this state of the authorities, I think it is desirable that the point should be settled. The point is essential to the appeal which therefore should be referred to a Full Bench as proposed by my learned brother.

*K. S. Krishnaswami Aiyangar* for appellants.

*K. Rajah Aiyar, N. S. Srinivasa Aiyar* and *S. V. Narayana Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—In our opinion a deposit in Court under S. 84, is only a special kind of tender, designed to make available a sure mode of proof to the mortgagor of the fact that he has made a tender. If he tenders in the ordinary way and that tender is denied, he may be defeated by false evidence; if he tenders by deposit in Court the matter is proved for him by the record.

We do not agree with the view of Phillips, J., that once the money is deposited and a reasonable time given to the mortgagee to take it out, interest thereafter cannot be allowed in any circumstances. Nor do we agree with the view apparently adopted in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) that if after depositing the money in Court, the mortgagor withdraws it, his original deposit is to be treated as nullity, in other words, that he is to be regarded as never having tendered at all.

In our opinion the deposit operated as a tender, and the only question properly arising was whether the mortgagor, notwithstanding his withdrawal, remained ready and willing to pay, throughout. The better opinion seems to be that the fact of the tender raises the presumption that the debtor con-

1. (1910) I L R 35 M 44. 6. (1889) 14 App Cases 273.

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tinued ready and willing to pay, and that the burden is cast upon the creditor to show that he was either not willing or not able to pay because he had utilised the moneys for other purposes. And it may be that the fact of withdrawal might, in certain circumstances, in itself be some evidence of unwillingness to pay. But, however, that may be, here there was an allegation in para. 6 of the written statement that the defendants had always been ready and willing to pay. On that no issue was raised and in our view that is sufficient to conclude the matter in the defendants' favour, and to preclude the plaintiffs (who have no merits) from claiming interest after the date of the deposit in Court.

The decree will be drawn up accordingly and must give credit for the sum of Rs. 865 with costs and interest referred to by Odgers, J.

Defendants will have the costs of the appeal.

T. S. V. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

Obla R. Narasimha Aiyar ... *Appellant** (*1st defendant—Petitioner*)

*v.*

Gunnia V. Rangachari and another ... *Respondents* (*Respondent—Plaintiff and nil*).

Narasimha Aiyar v. Rangachari.

*Civil Procedure Code, Ss. 55 (4) and 148—Scope of—Release from arrest—Failure to file petition in insolvency within 30 days—Power of Court to extend time.*

Where a judgment-debtor is released from arrest under S. 55 (4), Civil Procedure Code, but fails to apply to be declared an insolvent within 30 days of the order of the Court so releasing him, the Court has no jurisdiction to extend the period of one month fixed by the section. The period being one fixed by law, S. 148 also has no application.

Appeal against the Appellate Order of the District Court, Madura in A. S. No. 248 of 1924 presented against the order of the Court of the District Munsif of Madura Town in E. A. No. 567 of 1924 (E. P. No. 315 of 1924) in O. S. No. 2 of 1923 on the file of the Court of the Second Additional Subordinate Judge of Madura.

*A. Swaminatha Aiyar* for appellant.

*P. V. Krishnaswami Aiyar* for respondents.

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*A. A. O. No. 37 of 1925. 18th January, 1926.

Narasimha Aiyar *v.* Rangachari.

The Court delivered the following

JUDGMENT:—In this case, the petitioner was released on giving security under S. 55 (4) of the Code of Civil Procedure. Under that section, he has to file his petition in insolvency within 30 days of the order but he did not do so in the present instance and applied for extension of time on the ground that he had been ill for the latter half of the one month allowed. The Lower Appellate Court has held that the Court had no jurisdiction to increase the time of 30 days allowed by S. 55. It is now contended that under S. 148 the time may be extended, but under S. 148 the time that can be extended is a period fixed or granted by the Court. In an order under S. 55 (4), there is no question of the period being fixed or granted by the Court, for the period is fixed by the Code itself and consequently S. 148 would not appear to be applicable.

Reliance is, however, placed on a decision of the Privy Council in *Burjore and Bhawani Pershad* v. *Bhagana* (1) in which it was held that the Lower Court had rightly exercised its jurisdiction in extending the time provided by S. 602 of the old Code, which corresponds to the present O. 45, R. 7. In the old Code, there was no provision corresponding to S. 148 and that section, which is an enabling section, placed certain limitations upon the power to be exercised, the chief limitation being that the period which can be extended is that which is fixed or granted by the Court, and this would impliedly exclude periods fixed by law. A Bench of this Court held in *Vannisami Thevar* v. *Periaswami Thevar* (2) that the time prescribed in O. 21, R. 92 could not be extended by the Court, and a single Judge of this Court in A. A. A. O. No. 117 of 1922 held that the time under S. 55 (4) could not be extended by the Court. I agree with the views expressed in these two cases and hold that the Court has no power to extend the period of one month allowed under S. 55 (4).

S. 151 is also invoked but certaintly the circumstances of this case are not such as to warrant the exercise of such powers. No particular injustice has been committed, nor has the process of the Court been abused and even if there were power to interfere under S. 151, I certainly should decline to do so in the present circumstances.

The appeal is accordingly dismissed with costs.

T. S. V. *Appeal dismissed.*

1. (1883) I L R 10 C 557 (P C). 2. (1916) 1 M W N 179.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

The Tanjore Permanent Fund, Ltd., represented by its Secretary ... *Appellant** (1st *defendant*)

*v.*

T. Sadasiva Rao ... *Respondent* (*Plaintiff*).

Tanjore Permanent Fund Ltd. *v.* Sadasiva Rao.

*Company—Directors—Dismissal of Secretary—Cancellation of order at a meeting of the share-holders—Meeting adjourned—Resolution—Cancelling prior resolution—Absence of notice—Effect of—Ratification of resolution—Suit for damages—If maintainable—Principles guiding.*

The Secretary of a Company was dismissed from office by the Directors after due notice. At a general meeting of the share-holders of the Company, the order of the Directors was cancelled and the meeting adjourned to a later date. At the adjourned meeting the resolution of cancellation was itself cancelled and the dismissal order confirmed. Thereupon the Secretary sued the Company for a declaration that the resolution passed at the adjourned meeting was irregular and illegal as no proper notice of the resolution had been given, for restoration to office and for arrears of pay. *Held,* though there was an irregularity as to want of notice, it was open to the shareholders to rectify the defect and as the resolution had been accepted and subsequently acted upon. the plaintiff could not treat it as void and maintain the suit.

When a Company does a certain act, although in an irregular manner, it is not open to a stranger to contend that the act is void as regards himself. Nor can the interference of a Court be asked for in respect of acts of ordinary management of the Company. English case-law referred to.

Second appeal against the decree of the District Court of West Tanjore in A. S. No. 653 of 1920 preferred against the decree of the Court of the District Munsif of Tanjore in O. S. No. 316 of 1918.

*P. S. Chandrasekharan* for *A. Krishnaswami Aiyar* for appellant.

*B. Sitarama Rao* and *T. Appaji Rao* for respondent.

The Court made the following

ORDER:—The facts of the case are as follows:— The plaintiff was the Secretary of the 1st defendant Company and was validly dismissed from office by the Directors of the Company with effect from the 16th May, 1918. A meeting of the Company was subsequently held on 24th June, 1918, at which this dismissal order was cancelled. That meeting was adjourned to the 30th of June and on the 30th the question

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*Second Appeal No. 1147 of 1922. 5th January, 1926.

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was again considered and the resolution of the 24th June was cancelled. The subsequent proceedings of the Company show that the resolution of the 30th June was considered valid and was acted upon thereafter. The plaintiff has obtained a decree on the ground that the resolution of the 30th June was irregular and illegal since it was re-opening at an adjourned meeting a question already decided at a previous stage of the meeting and was a matter brought forward without proper notice. The law generally is that at an adjourned meeting a resolution which has already been determined at the original meeting shall not again come up for discussion without notice, and that is provided in the Draft Articles of Association, No. 16, Form B of Schedule III to the Indian Companies Act. This particular Article has been omitted in the Articles of the Association framed by the 1st defendant Company, and the question is whether that rule should be applied as it has been deliberately left out of the Articles. On the second point, as to whether matter was brought forward without proper notice, it is not quite clear what the learned District Judge intends to find. He has stated that on the 25th June the Directors referred the matter to a special Committee who reported on the 28th of June and that then a meeting was summoned for the 30th. The learned Judge appears to have omitted all consideration of Ex. C which was a notice issued on the 27th of June and makes no reference to any special Committee but informs the share-holders that the resolution of the 24th June would be recommended for cancellation at the adjourned meeting of the 30th. The Judge does not find definitely that this notice was not circulated to the share-holders but merely states that certificates of posting are forthcoming for only 27. The Company is situated in Tanjore and therefore it is quite possible many notices were served without the intervention of the Post Office, but on this point there is no finding. If that notice was issued to the share-holders, there can be no doubt that the share-holders had notice of this proposal to cancel the resolution of the 24th, and the subsequent resolution of the 30th would be entirely in order and binding not only on the plaintiff but also on the share-holders of the Company. As there seems to have been some mistake in considering this part of the case, I think that, before considering the other question of law involved in the suit, it would be advisable to have a fresh finding as to whether notice of the proposed resolution of the 30th was issued to the share-holders. At the same time the learned District Judge will

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be requested to say definitely what he means by his final conclusion in paragraph 17:—

"These resolutions were merely quoted to show that the company maintained the general position taken up by them on 30th June, 1918."

It is argued here that these subsequent resolutions had the effect of confirming the resolution of the 30th June. This question has not been considered by the District Judge although the resolutions were put forward to show that the Company maintained the general position taken up on 30th June, 1918.

The finding will be submitted within six weeks of the re-opening of the Lower Appellate Court after the vacation. Ten days will be allowed for objections.

[In compliance with the above order the District Judge of West Tanjore at Tanjore submitted the following finding:—

The High Court has called for a finding on the question whether notice of the proposed resolution of the 30th was issued to the share-holders. It is admitted that there were 3,000 or 4,000 subscribers. Ex. C. dated 27th June, 1918, was the notice. There is no evidence as to how many notices were printed. Ex. J (1) evidences that 27 notices were posted on the 28th and 30, on the 29th. Of the former, 23 were addressed to subscribers resident in Tanjore and 4 to those living at Mayavaram and Pattukotta. Ex. H is the certificate of posting for the 27 notices. These 27 notices must be deemed to have been given in sufficient time. Though there is no certificate of posting for the 50 notices, I do not doubt that they were posted. But only one of the 30 was addressed to a resident of Tanjore. I hold that the notices to 29 out of 30 was not reasonable. It is not unlikely that many notices were distributed in Tanjore but there is no evidence of the same. Ex. 1-d states that 61 attended on the 30th against 68 on the 24th; but no inference can be drawn either way therefrom. The larger number of votes on the 30th is due to the fact that some individuals had plural votes. I find that it has not been proved that notice of the proposed cancellation on the 30th of the resolution of the 24th was given.

I have been directed to say definitely what was meant by the sentence "These resolutions were merely quoted to show that the Company maintained the general position taken up by them on 30th June, 1918." As my predecessor wrote the judgment and as he has used the word 'quoted,' I can only state what the learned Vakil for defendants says was his rea-

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son for so quoting. He says he quoted the subsequent resolutions for inferring therefrom that the corporate body accepted and ratified the cancellation made on 30th June, 1918, that in any event the corporate body never wanted to go back on what was done at the meeting of 30th June 1918, and that in either view he did not want to rely on the subsequent conduct as an answer to plaintiff's case.]

After the return of this finding the Court delivered the following

JUDGMENT:—The respondent in this case was the Secretary of the Tanjore Permanent Fund. He was dismissed from the office by the Directors of the Company on the 16th of May, 1918 after receiving three months' notice. At a general meeting of the Company held on the 24th of June, 1918 the order of the directors was cancelled and the meeting was adjourned to the 30th of June. At this adjourned meeting the resolution of the 24th June, was in turn cancelled and the dismissal of the respondent confirmed. On 18th of July, 1918 the respondent filed this suit for a declaration that this last resolution was not legal and that he was entitled to continue as Secretary and also for arrears of pay. His suit was dismissed in the District Munsif's Court, but in the Lower Appellate Court the District Judge found that the resolution of 30th June, was irregular and illegal and gave the plaintiff a decree for arrears of salary and Rs. 500 damages. An additional finding was called for and the District Judge has found that proper notice of the resolution to be worked at the meeting of 30th June was not given, and he has stated that what he meant by the words in his original judgment, "These resolutions were merely quoted to show that the Company maintained the general position taken up by them on 30th June, 1918," was that "from the subsequent resolution it can be inferred that the corporate body accepted and ratified the cancellation made on 30th June, 1918, that in any event the corporate body never wanted to go back on what was done at the meeting of 30th June, 1918 and that in either view the defendant did not want to rely on the subsequent conduct as an answer to plaintiff's case." The question for consideration is whether the irregularity in the meeting of the 30th June gives ground for plaintiff's suit. At that meeting a resolution was passed that the dismissal of the plaintiff should stand. Such a resolution was within the powers of the meeting and it would appear that the resolution has been accepted and acted upon by the Company. Can therefore the plaintiff be now heard to say that by reason of

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the irregularity the action of the Company is rendered *ultra vires?* The question is a somewhat difficult one and I can find no direct authority on the matter, but it does appear from the cases cited that when a Company does a certain act, although in an irregular manner a creditor has no right to contend that such an act is void as regards himself. The cases cited are *Browne* v. *La Trinidad* (1), *In re Miller's Dale and Ashwood Dale Lime Co.* (2), *MacDougall* v. *Gardiner* (3) and *In re Oxted Motor Company Limited* (4). These are all cases of irregular procedure by a company in which the Courts held that the irregularity did not vitiate the proceedings. The facts of the case in *Browne* v *La Trinidad* (1) are not really applicable here, for that was concerned with an irregular meeting of the Board of Directors prior to the general meeting which passed the resolution. *In re Miller's Dale and Ashwood Dale Lime Co.* (2) a Company at an irregular meeting decided to raise new capital; it was held that where a director took shares in the capital raised in accordance with the resolution he was precluded from objecting to the validity of the resolution. Again in *In re Oxted Motor Company Limited* (4) a resolution to wind up a Company voluntarily was passed by two of the share-holders. Although no proper notice had been given of the meeting it was held that the creditors could not impeach the validity of the resolution when the share-holders of the Company acting together had waived the formalities required by the Companies' Act. At page 39 Greer, J., observed, "It may also be said that whether the notice required by S. 69 has been duly given or not this is a matter that concerns the share-holders alone, because the legislature has given the share-holders the right to say whether or not a Company shall be voluntarily wound up," and he relies on the decision of the Court of Appeal in *In re Express Engineering Works, Ltd.* (5). In *MacDougall* v. *Gardiner* (3) a meeting was adjourned without taking a poll. A suit was filled by one of the share-holders for an injunction restraining the Directors from carrying out the proposed arrangement was held to be unsustainable as it asked for the interference of the Court in the ordinary management of the Company. It no doubt appears that at the meeting of the 30th June objection as to want of notice was taken but the objection was overruled and the meeting proceeded to pass the resolution complained of.

1. (1887) 37 Ch D 1. 2. (1885) 31 Ch D 211.
3. (1875) 1 Ch D 13. 4. (1921) 3 K B 32.
5. (1920) 1 Ch 466.

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It was open to any of the share-holders who took this objection to call a further meeting after due notice in order to upset the resolution already passed, but no such action has been taken. On the contrary the irregular resolution has subsequently been accepted and acted upon. Consequently applying the principle laid down in the above cited cases I think that this resolution was a matter within the powers of the Company and that it is not open to the plaintiff to treat it as void. In *MacDougall* v. *Gardiner* (3) Mellish, L. J., says:—

> "In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

These remarks apply very usefully to the facts of the present case and consequently I hold that the plaintiff has no right to maintain this suit. In any event I am of opinion that the decree of the District Judge which awards arrears of pay from 16th May, 1918 to the date of plaint and Rs. 500 damages cannot be supported.

On 16th May, 1918 the plaintiff was validly dismissed and he certainly would be entitled to no damages until 24th June, 1918, the date on which his dismissal was temporarily cancelled. It is not suggested that he attended to the duties of his office at any time after 16th May, 1918, and I do not understand on what principle the District Judge has awarded Rs. 500 damages. The plaintiff having been validly removed in the first instance, he could have applied for other employment and it is not shown that by reason of the resolution of 30th June, 1918 he has been materially damaged and he certainly has rendered no service for which he could claim remuneration.

The second appeal is accordingly allowed and the plaintiff's suit dismissed with costs throughout.

The Memorandum of Objections is also dismissed with costs.

T. S. V. *Appeal allowed.*

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3. (1875) 1 Ch D 13 at 25.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, KT., *Chief Justice,* MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

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Venkatakrishna Reddy *v.* Krishna Reddy.

Venkatakrishna Reddi and others ... *Appellants* (Respondents—Defendants)*

*v.*

Krishna Reddi ... *Respondent (Petitioner—Plaintiff).*

*Civil Procedure Code, O. 22 Rr. 3 and 5—Application to be impleaded as legal representative—No rival claimants—Order dismissing application—If appealable.*

No appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on the record as his legal representative. *Ayya Mudali Velan* v. *Veerayee,* I L R 43 Mad 812: 39 M L J 218 overruled.

Appeal against the order of the District Court of South Arcot, dated 30th August, 1924, in A. S. No. 325 of 1923, presented against the order of the Court of the District Munsif of Villupuram, in I. A. No. 357 of 1923 in O. S. No. 451 of 1922.

*K. Bhashyam Aiyangar* for appellants.

*K. S. Jayarama Aiyar* and *S. Nagaraja Aiyar* for respondent.

The Court (Devadoss and Waller, JJ.) made the following Order of Reference to a Full Bench.

Devadoss, J.

DEVADOSS, J.:—The plaintiff in O. S. No. 451 of 1922, on the file of the District Munsif's Court of Villupuram died pending the suit and the respondent herein applied to be brought on record as the legal representative of the plaintiff. The District Munsif held that the will under which the respondent claimed the property of the deceased plaintiff was not genuine and dismissed his petition. The respondent preferred an appeal to the District Court of South Arcot. A preliminary objection was raised by the appellants herein to the appeal on the ground that no appeal lay against the order of the District Munsif. The District Judge overruled the preliminary objection and held that the will under which the respondent herein claimed was a genuine will, set aside the order of the District Munsif dismissing his application for being

*A A O No. 346 of 1924. 11th September and 29th October, 1925.

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added as the 2nd plaintiff and remanded the suit for disposal according to law. Against that order the defendants have preferred this appeal.

It is contended by Mr. Bhashyam Aiyangar for the appellants that no appeal lay to the District Court from the order of the District Munsif passed under R. 5 of O. 22 of the Civil Procedure Code. Under O. 22, R. 3, cl. (1), "Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit." Cl. (2) is as follows: "Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned.........." R. 5 provides: "Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court." S. 367 of the old Code was: "If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." The present R. 5 does not allow a separate suit to be brought for the purpose of determining who the legal representative is, nor does it require that the question should be decided at or before the hearing of the suit as to who shall be admitted to be the legal representative for the purpose of prosecuting the suit. It is therefore the duty of the Court to determine the question whether the person claiming to be the legal representative is the legal representative or not. Where there is a conflict between two or more persons as to who the legal representative is, the Court should determine the question and the person who is found by the Court to be the legal representative should be made a party to the suit.

The question is, does O. 22 contemplate the case of the Court dismissing the application of a person to be brought on record as the legal representative of the deceased plaintiff when there is no conflict between rival claimants. I think, considering the changes made in the new Code, the evident intention of the legislature was to allow the sole applicant to be brought on record as the legal representative. It did not contemplate

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the dismissal of a petition to be brought on record on the objection of the defendant, for it did not provide for the abatement of the suit in case such an application was dismissed. It has specifically provided for the abatement of the suit when no application is made within the time limited by law. It is open to the defendant to prove in the course of the suit that the right of the deceased plaintiff did not survive to the person brought on record. As that is the course contemplated by O. 22 there is no appeal provided against an order made under R. 5. Under the old Code, S. 588 (18) appeals were provided against an order refusing to bring the legal representative on record as well as against an order bringing the legal representative on record. The present Code advisedly has not mentioned orders under R. 5, O. 22, among the appealable orders in O. 43. The question therefore is whether an order refusing to bring a person as the legal representative of the deceased plaintiff, when he is the only applicant for the purpose, is a decree or only an order. If the Court refuses to bring the sole applicant on record as the legal representative of the deceased plaintiff, the Court has to dismiss the suit as it abates so far as the deceased plaintiff is concerned. The abatement of the suit is a necessary consequence of the refusal of the Court to bring the sole applicant on record. Under R. 9, when a suit abates or is dismissed under O. 22 no fresh suit would lie on the same cause of action. The result is the applicant even though he is the real legal representative, has neither an appeal against the order refusing to make him a party nor has the right to bring a separate suit on the same cause of action. He cannot bring a suit for declaration that he is the legal representative of the deceased plaintiff, for such a suit for obvious reasons would not lie. Did the legislature intend to lay down in O. 22 that a person who is the real legal representative of a deceased plaintiff but who, on the objection of the defendant, is not made a party to the suit in the place of the deceased plaintiff should go without any remedy and lose his right to the property in the suit? I think from the wording of R. 3 it is clear that an order refusing to bring the applicant on record as the legal representative of the deceased plaintiff, when there is no rival claimant to dispute his right is a decree, for it determines final rights between the parties.

It is contended by Mr. Bhashyam Aiyangar that the decision of the Court that the applicant was not the legal representative of the deceased plaintiff would not operate as *res judicata* in subsequent proceedings as the order was not made

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in a suit. Granting, for argument's sake that such an order is not one which is made in the suit, the principle of *res judicata* would apply, for it determines finally the question whether the applicant is the legal representative of the deceased plaintiff entitled to continue the suit on the cause of action alleged in the plaint or not. It was laid down by their Lordships of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao* (1), that the principle of *res judicata* would apply to a decision which finally determines the rights of the parties even though the decision was not in a suit. In that case an order made in land acquisition proceedings as regards the title of the parties barred a subsequent suit in respect of the matter which was in dispute in the land acquisition proceedings. It was contended in that case that the order in the land acquisition proceedings was not a decision in a former suit. Lord Buckmaster, who delivered the judgment of their Lordships observes at page 331:

"It has been suggested that the decision was not in a former suit but whether this were so or not makes no difference, for it has been recently pointed out by this *Board* in *Hook* v. *Administrator-General of Bengal* (2), that the principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of the Code in this respect."

In the light of this decision it is not possible to hold that a decision under O. 22, R. 5, would not operate as *res judicata* in a subsequent suit.

As there is conflict of authorities, I proceed to consider the most important cases on the point. In *Rama Rao* v. *The Rajah of Pittapur* (3), it was held by Sir John Wallis, C. J. and Seshagiri Aiyar, J., that an order striking out from the array of parties the defendant as an unnecessary party and dismissing the suit against him was in effect a decree and was appealable as such. In *Ayya Mudali Velan* v. *Veerayee* (4), Oldfield and Seshagiri Aiyar, JJ., held that an order rejecting the claim of a person to be the legal representative of the deceased plaintiff and to continue the suit amounted to a decree dismissing the suit and gave him the right of appeal from that order. The District Court relied upon these two decisions for overruling the preliminary objection. I am inclined to hold that the decision in *Rama Rao* v. *The Rajah of*

1. (1922) I L R 45 M 320: 43 M L J 78 (P C).
2. (1921) I L R 48 C 499: 40 M L J 423 (P C).
3. (1918) I L R 42 M 219: 36 M L J 169.
4. (1920) I L R 43 M 812: 39 M L J 218.

*Pittapur* (3) and in *Ayya Mudali Velan* v. *Veerayee* (4) are correct.

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In *Pakkai* v. *Pathumma* (5), it was held by Benson and Sundara Aiyar, JJ., that an order that a person is not the legal representative of a deceased plaintiff did not bar a separate suit. In that case the question whether an appeal lay against the order refusing to make a person the legal representative of the deceased plaintiff was neither raised nor considered; what the learned Judges held was that the decision of the Court refusing to make a person the legal representative of the deceased plaintiff was not a question arising for decision in the suit and therefore the principle of *res judicata* did not apply. But in view of the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao* (1), this decision cannot be said to be good law. Further there is a specific provision in R. 9 against a separate suit on the same cause of action.

Reliance is placed by Mr. Bashyam Aiyangar on *Subramania Aiyar* v. *Vaithilinga Mudaliar* (6), for the position that no appeal lies from an order refusing to make a person the legal representative of a deceased plaintiff. The facts of the case are distinguishable from the facts of the present case. There the Court did make one of the rival claimants a party in the place of the deceased plaintiff, and the suit did not abate in consequence. The Court held that the rival claimants who were not made parties to the action had no right of appeal. The case is different when the sole applicant is not made a party on the ground that he is not the legal representative for the order amounts to a final determination of one of the questions in issue between him and the defendant and that decision finally determines the result of the suit. The case in *Venkata Seshamma* v. *Ganneswara Rao* (7), is also distinguishable from the present case. In that case also the suit did not abate as one of the applicants was not made a party to the suit. Spencer and Kumaraswami Sastri, JJ., held that no appeal lay against an order refusing to make some of the claimants parties to the action and they distinctly say that there was no abatement of the suit. In *Subbarayya* v. *Saminadaiyar* (8), it was held that an appeal

1. (1922) I L R 45 M 320: 43 M L J 78 (P C).
3. (1918) I L R 42 M 219: 36 M L J 169.
4. (1920) I L R 43 M 812: 39 M L J 218.
5. (1913) M W N 673.
6. (1918) M W N 198.
7. (1924) M W N 58.
8. (1895) I L R 18 M 496: 5 M L J 63.

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lay against an order dismissing the application of a person to be brought on record as the legal representative of the deceased party. The learned Judges observe at page 497:—

"The title to represent being denied, there is in the present case a dispute between the claimant and the defendant. We therefore think the District Judge ought to have entertained the appeal. We also think that the appeal lay against the decree dismissing the suit." This was followed by a Bench of the Allahabad High Court in *Hanwant Singh* v. *Ramgopal Singh* (9).

In *Ram Sarup* v. *Moti Ram* (10), it was held that no appeal lay from an order dismissing the application of a person to be brought on record as the legal representative of a deceased plaintiff and that such an order was not a decree. In *Sital Prasad* v. *Bajrangi Sahai* (11) it was held that such an order did not come within the definition of the word "decree" as the question was not in controversy in a suit and as the person seeking to be added as a party was not a party to the suit. In a recent case in *Rukmani Ammal* v. *Veeraswami Aiyangar* (12) Jackson, J. held that no appeal lay against an order under R. 5 of O. 22.

It is unnecessary to deal with the other cases quoted by Mr. Bashyam Aiyangar. I think the proper course in such cases would be to make the sole applicant a party to the suit and then raise an issue as to whether he is the legal representative or not as preliminary issue and try the other issues if the preliminary issue is found in favour of the person brought on record. Such a decision would amount to a decree and the person who is brought on record as the legal representative would have a right of appeal against the decree.

As, however, there is a conflict of authorities on this point I would refer for the decision of a Full Bench the question whether an appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on record as his legal representative.

Waller, J.

*Waller, J.*:—I agree that there being a conflict of authority on the question, it should be referred for the decision of a Full Bench. My own view is that no appeal lies.

9. (1908) I L R 30 A 348.
10. (1920) I L R 1 Lah 493.
11. (1911) 13 I C 70.
12. (1924) 47 M L J 370.

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An order of this kind could be appealed against as an order under the old Civil Procedure Code. Under the present Code no appeal lies against it under O. 43 and I do not think that it can be appealed against as a decree. The decision on an application under O. 22, R. 3 is not a matter that is in controversy in the suit itself. If there is a dispute whether the applicant is or is not the legal representative, it has to be determined under R. 5 before the suit can be proceeded with.

*K. Bhashyam Aiyangar* for appellants.

*K. S. Jayarama Aiyar* and *S. Nagaraja Aiyar* for respondent.

The Court expressed the following

OPINION:—The question referred to us is in the following terms:—

"Whether an appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on the record as his legal representative."

The facts of the case are that on the 14th April, 1923, the plaintiff on record died. On the 20th June, within the period demarcated by law the petitioner (respondent herein) petitioned to be brought on the record as the legal representative of the deceased plaintiff. The ground on which he sought to be brought on record was that he was the legatee of the deceased plaintiff and took under her will the properties in suit. The learned District Munsif made an order on the 30th June in the following terms:—

"Subject to the proof of the genuineness of the will, the petitioner may be brought on record as the operation and validity of the will turns upon the finding of the first issue."

That of course, was purely a conditional order. On the 14th August the District Munsif proceeded to inquire into the questions outlined in the provisional order, *viz.*, the genuineness of the will and passed the order of that date. He found the will was not genuine and as a consequence of course the provisional order as to the appellant being brought on record fell to the ground.

The material provisions of the Code are parts of O. 22 and O. 43. By O. 22, R. 5, where a question arises as to whether any person is or is not the legal representative of the deceased plaintiff or a deceased defendant, the said question shall be determined by the Court. By R. 9 (2) the plaintiff or the person claiming to be the legal representative of the deceased plaintiff so far he may apply for an order to set

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aside the abatement or dismissal; and, in certain circumstances which are set out in the rule, the Court shall set aside the abatement. The question is whether an appeal lies from an order made in pursuance of O. 22, R. 5, if the determination, to call it by an unequivocal term for a moment, was an order within the meaning of the Code.

If it is then under O. 43, R. 1, such an order does not fall within the list of orders there given from which appeals lie to a higher tribunal. We may notice in passing that the order does provide for an appeal against an order made under O. 22, Rr. 9 and 10 but not against orders made under any other rules in that order. It appears to us therefore that, assuming this to be an order, the Code expressly excludes its being appealed against as an order. Whether the respondent in this case would or would not have a remedy by way of appeal against the abatement which follows as a consequence of this order is another matter. But we are not concerned with that, there is nothing about it in this order which was simply one refusing to make him legal representative and was entirely silent as to any question of abatement or dismissal of the suit. But it is sought to say that it is appealable for the reason that it is not in truth an order but a decree. The definition of "decree" is contained in S. 2 (2) of the Code and runs as follows:—

> "A decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

The line of argument appears to be this—and that is the reason for the appearance of the words in the reference, "When there is no rival claimant for being brought on the record as legal representative," that where there is only one claiming to be the legal representative, the effect of rejecting that person's claim is *ipso facto* to bring the suit to a close and that therefore the order dismissing the claim is a final adjudication as between the only possible parties. It was held in *Ayya Mudali Velan* v. *Veerayee* (4) by Oldfield and Seshagiri Aiyar, JJ. that an order rejecting the claim of a person to be the legal representative of a deceased plaintiff and continue the suit amounted to a dismissal of the suit and was therefore appealable as a decree. The extreme inconvenience of that view would be this: that an order rejecting the claim of a

4. (1920) I L R 43 M 812: 39 M L J 228.

person to be legal representative would be a decree if he were the only available legal representative but would only be an order if there were rivals, any one of whom might have applied to be declared to be the legal representative and brought on record. We ought to point out that at the time when this person applied to be made a legal representative, namely, on the 20th June, it might quite well have been that other claimants would have come forward before the date when the time for applying expired, namely, the 14th July; so that at the time the plaintiff was petitioning there was nothing to show that, even if his petition was rejected, other persons might not come forward to represent the interests of the deceased plaintiff. On that ground we think it impossible to say that a mere refusal *per se* to appoint a person the legal representative of a deceased plaintiff or a deceased defendant can be regarded as a final decree, partly because the Court would have to go into all sorts of inquiries to ascertain what were the surrounding circumstances before it could decide whether such refusal was a decree or an order. It seems to us that the Code cannot have contemplated the institution of such an enquiry as that. For these reasons we are of opinion that we should answer this reference by saying that no appeal lies against the order in this case; but we give no expression of opinion as to what would be the consequence if the petitioner appeals against the actual order of abatement or dismissal.

It follows that in our opinion that *Ayya Mudali Velan* v. *Veerayee* (4) was wrongly decided.

T. S. V. *Reference answered in the negative.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

N. K. Govindan Nayar ... *Petitioner** (*Petitioner in C R P No. 30 of 1925 on the file of the High Court*)

Kanhirathotikayil Ithaletty ... *Respondent* (*Respondent in do*).

Govindan Nayar v. Ithaletty.

*Court Fees Act, S. 7 cl. i and ix—Suit for redemption of Kanom and for damages—Court-fee on damages—If payable—Malabar compensation for Tenants' Improvements Act (1 of 1900), S. 6 (3)—"Or otherwise in respect of the tenancy"—Damages if included in—Civil Procedure Code, O. 47, R. 1—Review of judgment—When allowed.*

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*C M P No. 3199 of 1925. 8th October, 1925.

4. (1920) I L R 43 M 812: 39 M L J 218.

Govindan Nayar v. Ithaletty.

Where in a suit for redemption of a *kanom* the plaintiff also claims damages, which he wants to be set off against the *kanom* amount or the amount payable by way of improvements he is not bound to pay any Court-fee on the amount of damages till after it is ascertained and a set off is allowed. The words "any sum of money accruing due for rent or otherwise in respect of the tenancy" in S. 6 (3) of Madras Act I of 1900 are wide enough to include damages, and damages cannot be taken into account in ascertaining the value of the suit for purposes of Court-fees and of jurisdiction. *Abdulla Koya* v. *Kallumpurath Kanaran,* 33 M L J 463, *Pumpaliya Vengaliya* v. *Kunhamina,* 25 I C 704 and *Zamorin of Calicut* v. *Narayana,* 5 Mad. 284 followed.

A Judge should not review his judgment merely because rulings which were not brought to his notice at the hearing were subsequently discovered by a party. There must generally speaking be finality. But where the question decided is not one of right between the parties, *e. g.,* when it relates solely to Court-fees, and when the matter is one of general importance, review is justified.

Application, under S. 114 of the Civil Procedure Code, for review of the judgment of the High Court, dated the 8th September, 1925 in C. R. P. No. 30 of 1925* presented against the Order of the Court of the Additional District Munsif of Calicut in I. A. No. 1123 of 1924 in O. S. No. 286 of 1923.

*K. P. Ramakrishna Aiyar,* for petitioner.

*A. Parameswara Aiyar* for respondent.

The Court made the following

ORDER:—The petitioner applies for review of my judgment in Civil Revision Petition No. 30 of 1925.*

Most of the grounds set forth in his application are clearly unsustainable. There is no error on the face of the judgment and the best proof that my previous judgment was based on no misapprehension of the argument and vitiated by no omission of material points lies in the fact that at the second hearing no fresh argument and no fresh points have been adduced. What happened was that the learned vakil built up an argument on behalf of petitioner which appeared to me to be well founded, but lacking the coping stone. Appraised of this defect by my judgment, he has searched the Reports and has found what was previously wanting. The first question is, whether in these circumstances this Court should allow a review.

As pointed out by the Judicial Committee in *Chhaju Ram* v. *Neki* (1), R. 1 of O. 47 must be read as in itself definitive of the limits within which review is permitted and words "any other sufficient reason" in that rule mean a reason on grounds at

*Reported in 50 M L J 213.

1. (1922) 43 M L J 332 (P C).

Govindan Nayar v. Ithalelutty.

least analogous to those specified immediately previously. If after exercise of due diligence, and no one accuses Mr. Ramakrishna Aiyar of want of diligence in this case, a pleader fails to lay his hand upon certain material rulings which are not to be found in the authorised reports; the situation is certainly analogous to one where new and important matter was not within the knowledge of the party. But I hasten to add that this, in my opinion would not conclude the question, and there is good authority for holding that a Judge should not review his judgment merely because a party has found fresh rulings on the matter, because there are further considerations of prime importance. A Judge cannot ordinarily give and take away in the same proceeding. After he has given one party his decree, only the most exceptional circumstances would justify a Judge in depriving him of it. And merely that a Judge has altered his mind would not, in my opinion, constitute such justifying circumstance. There must, generally speaking, be finality. But it so happens that these considerations do not apply to this particular case. The respondent has opposed the Civil Revision Petition and was fully entitled to do so, since a defendant can make every legal defence, but it is not a question of right between the two parties, being a mere matter of Court-fees. The order sought to be reviewed gave nothing to the respondent, except such advantage as he might hope to reap through his antagonist being heavily taxed. Review therefore involves no deprivation. And there is no question here of the Court altering its mind. I was prepared to accept the petitioner's argument if authority on the culminating point was forthcoming and now that it is produced to find in his favour would not be to go back, but to go forwards, upon the previous argument.

Moreover, this is a matter which transcends the interests of the actual parties before me. It governs the procedure in a very common form of suit in Malabar and the effect of a wrong decision will be far reaching.

The Court then of itself must consider the validity of its judgment and *Vellaya* v. *Jagannatha* (2) is authority for holding that in such circumstances, review is justified. Accordingly I allow the petition for review, but only, be it understood with regard to the particular circumstances of this case. In most cases, the predominating principle to be considered is finality.

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2. (1883) I L R 7 M 307.

Govindan Nayar v. Ithaletty.

To turn to the merits. It has been held that a mortgagor suing in redemption in Malabar is not bound to value his suit according to the amount he may have to pay for improvements, *Zamorin of Calicut* v. *Narayana* (3). This ruling is based on the opinion of three out of the five Judges forming the Bench, the other two dissenting, which shows how evenly the question is balanced. Now, if it could be shown that damages are in *pari materia* with improvements, the same reasoning would apply and damages cannot be taken into account in ascertaining the amount for the purposes of jurisdiction. If the plaintiff does not know the amount, how can he fix it for jurisdiction? It was argued at the previous hearing that damages and improvements were on the same footing, because in S. 6 (3), Madras Act I of 1900, there is provision for improvements, money accruing due for rent, or otherwise in respect of the tenancy, and this latter phrase included damages. It seemed to me remarkable that if the legislature had intended damages to come within the category, it should not have said so in terms, and to describe damages as money accruing due in respect of a tenancy is very circuitous. And as I remarked, I was impressed by the circumstance that no ruling which sanctioned such interpretation was produced. It seemed that the question must have arisen and the very absence of rulings was an argument *ab silentio* in favour of respondent's contention that the phrase did not refer to damages. Therefore, I rejected the argument. Now petitioner has produced two rulings of this Court. In *Abdulla Koya* v. *Kallumpurath Kanaran* (4), Spencer, J., finds in terms that the words "any sum of money accruing due for rent or otherwise in respect of the tenancy" are wide enough to include damages and Sadasiva Aiyar, J., concurs. The latter Judge sitting with Napier, J., found to the same effect in *Pumpaliya Vengaliya* v. *Kunhamina* (5).

I find therefore, that the petitioner is entitled to pay the Court-fee after the amount recoverable, by way of damages, has been ascertained and set off against the amount payable by way of improvements.

The petition is allowed and this finding supersedes my former judgment except in respect of costs.

T. S. V. *Review petition allowed.*

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3. (1882) I L R 5 M 284 (F B).
4. (1917) 33 M L J 463.
5. (1914) 25 I C 704.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

Acha ... *Petitioner** (*Plaintiff*)

*v.*

Sankaran and others ... *Respondents* (*Defendants*).

Acha *v.* Sankaran.

*Civil Procedure Code, S. 115—Court-fees—Order directing payment of additional Court-fee—Interlocutory order—Interference in revision.*

The High Court should not interfere under S. 115, Civil Procedure Code with an interlocutory order directing the plaintiff to pay additional Court-fees and granting time for the payment of such fees.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order, dated 8th April, 1924 of the Court of the Subordinate Judge of South Malabar at Calicut in O. S. No. 2 of 1924.

*K. Kuttikrishna Menon* for appellant.

*B. Sitarama Rao* and *N. Govindan* for respondents.

The Court delivered the following

JUDGMENT:—This is an application to revise the order of the Subordinate Judge of South Malabar directing the plaintiff to pay additional Court-fee.

The first question for determination is whether this Court will interfere with such an order under S. 115 of the Civil Procedure Code. No doubt in *Sudali Muthu Pillai* v. *Sudalimuthu Pillai* (1) Oldfield, J., held that such a case did come within S. 115 and he accordingly passed an order under that section. It may be observed however that in that particular case the order demanding additional Court-fee was coupled with an order dismissing the appeal in case of default. In the present instance, we have no such conditional dismissal but time was granted for the payment of the fee. In the Patna High Court it has consistently been held that the Court would not interfere in such a case [vide *Musammat Lachmibati Kumari* v. *Nand Kumar Singh* (2).] and the same view was taken by a Bench of the Calcutta High Court in *Gobindu Das Nath* v. *Nitya Kali Dasi* (3). With all respect it appears to me that this is the right course to follow. Even if the plaint is rejected on the ground that the Court-fee has not been paid the plaintiff will have a right of appeal and if he pays the

*C R P No. 522 of 1924. 18th January, 1926.

1. (1922) 17 L W 623. 2. (1920) 5 Pat L J 400.

3. (1919) 51 I C 581.

Acha v. Sankaran.

extra fee and has a trial of the suit and the suit is dismissed the question can again be raised by him in appeal. This being so, it seems useless to interfere in revision with what is in effect an interlocutory order which can be questioned hereafter. The mere admission of this petition has led to nearly eighteen months delay in the trial of the suit. Taking this view, I must dismiss this petition with costs. Plaintiff will have another month within which to pay the extra Court-fee.

T. S. V. *Civil Revision Petition dismissed.*

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## PRIVY COUNCIL.

(On Appeal from the Court of the Resident, Mysore.)

PRESENT:—VISCOUNT DUNEDIN, MR. AMEER ALI AND SIR ARTHUR CHANNELL.

Thomas Charles William Skipp ... *Appellant**

*v.*

Lilian Mildred Kelly ... *Respondent*

P. C. — Skipp v. Kelly.

*Promise of marriage—Promisee a married woman of Roman Catholic religion—Her subsequent divorce—Conduct of parties thereafter—Whether new promise or ratification of old void promise.*

The defendant (appellant) promised to marry the plaintiff (respondent), a lady professing the Roman Catholic religion, who at the time was married, but living separate from her husband. She later succeeded in obtaining a divorce from her husband, and the parties then continued to behave as engaged persons, the defendant buying her a ring, and fixing the date of their marriage. The defendant then on various occasions postponed the marriage, and eventually married another lady.

The plaintiff in her suit for damages for breach of a promise of marriage, alleged that such promise was originally made to her by the defendant while she was living apart from her husband, and that the defendant had also then undertaken to assist her with funds in obtaining a divorce, which was done, and that the promise was renewed thereafter. The defendant contended *inter alia* that the original promise, which he admitted, was void and against public policy, as having been made to a woman whose husband was then alive, and professing the Roman Catholic religion, which did not recognise divorce among its adherents; he further denied having renewed the promise, and that his conduct at the utmost amounted after the divorce to a ratification—which was of no legal effect—of the void promise made before the divorce.

*Held* (affirming the judgment of the District Judge, and the Resident, Bangalore), that the Lower Courts were right in holding that there was a promise to marry when the plaintiff should succeed in obtaining a divorce; and that "when persons fix a day for their marriage, it may be inferred that there is a new promise of marriage, and not necessarily a ratification of a prior void promise."

*Ditcham* v. *Worrall,* 5 C P D 410 followed.

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*P C Appeal No. 152 of 1924. 26th January, 1926.

Consolidated Appeal and Cross-appeal from a decree dated the 20th March, 1923 of the Resident, Bangalore (W. P. Barton, Esq.) modifying a decree of the District Judge, Bangalore (J. A. deRozario, Esq.) dated the 11th September, 1922.

Mrs. Lilian Mildred Kelly, was married to William Merl Kelly in 1905, but lived apart from him after two years of married life. Between 1910 and 1912, she became acquainted with Thomas C. W. Skipp, a widower, who proposed marriage to her, and offerred to help her financially to procure her divorce. The offer of marriage was accepted, and with the aid of funds advanced by Skipp, Mrs. Kelly obtained a decree *nisi* on the 13th August, 1913, and a decree absolute on the 11th August, 1914. The offer of marriage was then renewed and re-accepted. They then behaved as an engaged couple, and in June, 1919, Skipp brought and gave Mrs. Skipp an engagement ring; a few days afterwards it was arranged that the marriage should take place in December, 1919, but was subsequently postponed by Skipp on various grounds, and on the 7th April, 1920 Mrs. Kelly left for England. On the 25th August, 1920, Skipp married another lady. Mrs. Kelly heard of it in 1921, and on the 21st December of that year instituted the present suit before the District Judge, Bangalore, where the parties lived, claiming damages Rs. 1,50,000, on the facts set forth above, as also the further allegation that the defendant in April, 1915, under a solemn promise to marry her very shortly in pursuance of the promise already given, seduced her, and subsequently, under repeated promises to the same effect, induced her to consent to co-habitation with him. Skipp in his written statement, stated that he proposed marriage to Mrs. Kelly about the year 1919, provided she obtained a divorce, and that she accepted. He denied that there ever was a renewal of the promise, and said that the true reason for his putting off the marriage was that Mrs. Kelly, being a Roman Catholic, whose divorced husband was still alive, was not, by the tenets of her Church, in a position to marry. The contract was therefore void in law as against public policy, and his conduct subsequent to the divorce, including the giving of the engagement-ring, only amounted to a ratification of the previous void promise. The allegation of seduction was denied. He also pleaded, alternatively, that the promise had been broken by Mrs. Kelly herself with his acquiescence.

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The District Judge (J. A. deRozario, Esq.) on the 11th September, 1922, held the original promise before the divorce to be void and contrary to law, but that the "continued recognition by both parties after the disability ceased to operate gave the agreement the binding force which it previously lacked, that in June, 1919, the parties agreed to be married in December, and that was obviously a new contract, distinct from the old void one." He held also that Skipp had broken the contract, and finding the seduction proved, awarded Mrs. Kelly Rs. 50,000; as damages. The Resident (W. P. Barton, Esq.) on appeal agreed with the findings of the District Judge, except as to the seduction, and accordingly reduced the damages to Rs. 15,000 only. Both parties thereupon appealed to His Majesty in Council.

*E. Labouchere Thornton for Skipp.*—The contract, if any, was rescinded and dissolved by the agreement of both parties, for the departure of Mrs. Kelly for Europe on the 7th April, 1920, without previously informing Skipp, implied that she intended to release him from the engagement. Her silence thereafter until September, 1920 confirmed this implication; *Davis* v. *Bonford* (1); *Spiers* v. *Hunt* (2); further the proposal of marriage was made and accepted prior to the institution of divorce proceedings, but ratified and confirmed after the divorce. Such a contract is void *ab initio*; *Wilson* v. *Carnley* (3). The District Judge finds the original contract void and contrary to the policy of the law; but he confuses a *void* and a *voidable* contract, and misapplying *Ditcham* v. *Worrall* (4) holds the giving of a ring in June, 1919, and the fixing of the marriage for the following December, constituted a new contract. It is submitted that in the circumstances of the case, the fixing of an indefinite date for the wedding 7 or 8 years after the commencement of the engagement cannot be construed to amount to a fresh promise or a new contract. Finally, in view of the Resident having rejected the finding of seduction, merely nominal damages should have been awarded.

*R. A. Yule* for Mrs. Kelly was not called upon, and did not proceed with her appeal.

26th January, 1926. The Judgment of the Board was delivered by

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Dunedin.

VISCOUNT DUNEDIN.—This is an action by a lady for breach of promise of marriage against the defendant. The

1. (1861) 30 L J. 139.
2. (1908) 1 K B 720.
3. (1908) 1 K B 729.
4. (1880) 5 C P D 410.

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case was tried by the District Judge of the Civil and Military Station, Bangalore. He formulated the following issue: "Was there a valid contract of marriage?" Their Lordships think perhaps the expression there used ought rather to have been whether there was a definite promise of marriage, because the expression "contract of marriage" is usually used in another sense, but it is quite plain what he actually meant. He found that issue in favour of the plaintiff. He then went on with another issue: "If there was such a valid contract, did the defendant or the plaintiff break it either expressly or impliedly?" He found that issue also in favour of the plaintiff. When the case went to appeal the learned Resident in Mysore found that the engagement did subsist up to the time of the defendant's marriage with another lady, and therefore a breaking of the contract was necessarily inferred.

The point was taken by the plaintiff, the respondent in the main appeal, that these two findings, being concurrent findings of fact, cannot be interfered with, and, to a certain extent their Lordships think that is true, but at the same time the defendant put forward what he considered a legal plea, because he said that upon a proper consideration of the promise which had been held proved, that promise was not a promise which could be recognised in law, because it was merely a ratification of a void promise which had been made before.

That plea arises upon these facts. It is undoubtedly the case that the defendant first promised to marry the plaintiff when, as a matter of fact, she was a married woman. It was understood between them that a divorce was going to take place,and a divorce afterwards did take place; but it has been quiet well settled,and no one can doubt the law upon the subject, that a promise made in such circumstances is a void promise. Nevertheless, the parties considered themselves as engaged persons; behaved as engaged persons, and, though their Lordships need not go through the various circumstances of the case, it is certain that after the divorce proceedings had gone through, and consequently the plaintiff became a free woman, the defendant bought her a ring and actually arranged the date on which they were to be married.

The legal point is whether, from circumstances like that, it is possible to infer what really is in law a new promise to marry. There is no difficulty as to consideration because the promise to marry is sufficient consideration. It seems to their Lordships that the case is in precisely the same position

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as the case of *Ditcham* v. *Worrall* (4), and their Lordships cannot do better than read a few words from the judgment of Lindley, J. (as he then was) in that case. He says at p. 414:

"Unless, therefore, the statute" (he is speaking of the Infants Relief Act) "forbids such an inference from their conduct, it appears to me that the jury might have found, and ought to have found, that there was a promise by the defendant after he came of age to marry the plaintiff on the day ultimately fixed for the marriage, and not a mere ratification of a promise made previously to marry at a day to be thereafter fixed,"

and then he gives reasons for saying that that opinion is warranted by the decision of the House of Lords in the case of *De Thoren* v. *Attorney-General* (5). Their Lordships entirely agree with that reasoning. It seems to them that when persons fix a day for their marriage it may be inferred from this that there is a promise of marriage, and one is not bound to take it as a ratification of a contract which in itself is void, and which, therefore, in law cannot be rectified by anything that can be subsequently done.

Accordingly their Lordships think that the learned Judges here on the facts, which cannot be controverted because they are concurrent findings, came to a conclusion which they were perfectly warranted in law in coming to.

Although their Lordships did not stop the appellant from reading the evidence, they really think that the examination of the evidence as to how the parties behaved afterwards was scarcely relevant in view of these two findings, but, as it has been gone into, their Lordships would wish to say that they think that the learned Resident has taken a perfectly correct view of what happened between these two parties. They had lover's quarrels, each was unwilling to take the first step of reconciliation, and so they drifted on with periods of separation, but after a time came together in India, when this renewed promise was made.

Now the learned District Judge held that the matter was made worse by what he considered was a proof of seduction. That proof of seduction was rejected, and rejected their Lordships think upon perfectly right grounds, by the learned Resident on appeal. The result was that the learned Resident, on appeal, reduced the damages from Rs. 50,000 to Rs. 15,000

Their Lordships, whatever their own views would have been if they had been trying the case, would never think of interfering with a measure of damages which had been fixed by

4. (1880) 5 C P D 410. 5. (1876) 1 App. Cas. 686.

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a learned Judge unless they saw that there was something very clearly wrong with the figure which he had fixed upon, and, therefore, as regards this part of the judgment also they do not consider it right that it should be altered.

Their Lordships will therefore humbly advise His Majesty that the main appeal should be dismissed, and that the respondent should have such costs as a pauper can obtain, because she has been allowed to defend *in forma pauperis,* and, as her cross-appeal has not been insisted upon, it should also be dismissed, and that there should be no costs to either party in that cross-appeal.

Solicitors for T. C. W. Skipp : *Josselyn and Elwes.*

Solicitor for L. M. Kelly : *H. S. L. Polak.*

A. De M *Appeal dismissed.*

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## PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD DUNEDIN, LORD SHAW, LORD BLANESBURGH AND SIR JOHN EDGE.

Raja Rajeswara Setupati Avargal, Raja of Ramnad ... *Appellant**

*v.*

Kamid Rowthen and others ... *Respondents.*

P. C. Rajah of Ramnad v. Kamid Rowthen.

*The Madras Estates Land Act (I of 1908)—Applicability—Right of ryots to cut palmyra trees—Trees part of holding—Lease of trees alone—Difference between—Illegal cutting of trees—Liability to pay damages—Measure of damages.*

The Rajah of Ramnad who had granted pattas to different ryots filed a number of suits against them to recover damages in respect of his palmyra trees alleged to have been illegally cut by them. *Held,* the liability of each of them would depend on whether S. 12 of the Madras Estates Land Act applied to his case. In the case of such of the ryots as were holders of the land on which the trees stood and who had cut such trees, S. 12 would afford a protection; but if the right to the trees depended not on the fact that the trees stood on their holdings but on a separate lease of the trees as such, damages could be awarded for illegal cutting by the ryots and would be measured by the full value of the trees so cut. To such a case S. 12 had no application. *Murugappa v. Ramanathan Chettiar,* 1 L W 881 approved.

Appeal from the judgment and decree of the Madras High Court (Sadasiva Aiyar and Spencer, JJ.) in C. R. P. Nos. 164 to 178, 180 to 183 of 1918 preferred against the decree of the Munsif of Manamadura.

*P C Appeal No. 29 of 1924. 21st January, 1926.

P. C.

Rajah of Ramnad v. Kamid Rowthen.

Lord Dunedin.

*L. De Gruyther* and *Kenworthy Brown* for appellant.

*K.V.L.Narasimham* and *P. Subba Rao* for respondent.

21st January, 1926. The Judgment of the Board was delivered by

LORD DUNEDIN:—The plaintiff in the present set of cases is the Zamindar of Ramnad, an estate situated in the Presidency of Madras. The defendants are ryots who are tenants of the plaintiff in virtue of certain pottahs. The plaintiff complained that the defendants had cut down trees belonging to him. The trees were palmyra trees, which yield a juice which is tapped from the trees, and, as it makes an intoxicating liquor, has a commercial value. The plaintiff raised separate actions against each alleged wrongdoer in the Court of the District Munsif of Manamadura. The pleading in the case was in the highest degree unsatisfactory and was, as will appear hereafter, the real cause of the unsatisfactory condition of the case on the appeal before this Board. It may be here parenthetically explained that the ordinary position of a ryot is that he is in possession of the land for agricultural uses, but that he is not entitled to cut down trees. But in Madras there is special legislation dealing with the subject, namely, the Madras Estates Land Act, being Act I of 1908. S. 12 of that Act is in the following terms:—

"Subject to any rights which by custom or by contract in writing executed by the ryot before the passing of this Act are reserved to the landholders, every occupancy ryot shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the ryot or which may naturally grow upon the holding he shall have the right to use, enjoy and cut down, notwithstanding any contract or custom to the contrary."

In the definition clause, S. 3, sub-section 6, "occupancy ryot" is defined:—

"'Occupancy ryot' means a ryot having a permanent right of occupancy in his holding."

Then sub-section 15 defines "ryot":—

"'Ryot' means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it."

Sub-section 3 defines "holding":—

"'Holding' means a parcel or parcels of land held under a single patta or engagement in a single village."

Now, what the plaintiff ought to have said in each case was in plain terms that the defendants were not persons to whom S. 12 applied, because they were lessees of the trees in terms

P.C.

Rajah of Ramnad *v.* Kanid Rowthen.

Lord Dunedin.

which made them usufructuaries of the trees, but did not give them the trees as a mere appanage of land let to them, and then to have averred that they had wrongfully cut down the trees. Instead of this, what he did was this (the averments in one case may be taken as a sample of the whole as they are all in terms practically identical). After averring the cutting down of the trees, he said:—

"The defendant, who is bound according to the custom of the village and Zamin and according to law to pay compensation to the plaintiff for the said trees, has not done so."

To this the defendant (again taking one case as a sample) replied first, by denying that the trees had been cut and, second, by denying the custom alleged. It is thus evident that, so far, the real question as to whether the Act of 1908 applied had not been properly raised. It is true that it had been alleged that the pottah was a tree pottah. But that allegation had not been presssed home by the appropriate plea, that the result was that the Act did not apply. On the contary a custom of payment had been set up, which exactly fits the exception mentioned in the opening words of S. 12. The parties then went to trial in the Court of the District Munsif of Manamadura. He delivered a judgment. In this judgment he found as a fact that the trees had been cut. He then found in law that, as a tirva or rent, was paid for the trees, the trees belonged to the Zamindar and that, therefore, at common law, apart from custom, if the tenants cut the trees they must pay damages. He then went on to deal with the averment of custom as if it had been an averment of custom, not as to right of payment, which it obviously was, but as to scale of payment, which it obviously was not. He then found that there was no universal custom proved as to scale, and thus it being left to himself to determine the figure of damages, he determined them as 25 years' purchase of the annual rent value of a tree. He did not in his judgment make any mention of the Act of 1908. He granted decrees in all cases for a sum representing the 25 years' purchase of the rental value of the trees cut.

From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, *i. e.*, civil revision petition, was preferred to the High Court of Madras. This was disposed of by Moore, J. He in his judgment, after stating the claim, says this:—

"These Civil Revision Petitions arise out of a number of small cause suits which were brought by the petitioner the Raja of Ramnad to recover from

his tenants the value of palmyra trees on their holdings which had been wrongfully cut and appropriated by the tenants. The value of the trees was claimed at the rate of Rs. 3 per tree in one village and Rs. 6 per tree in the other two villages. In C R P No. 1252 of 1918, the petitioner is the defendant in one of the small cause suits. It was alleged in the plaint that the defendants, who were bound according to the custom of the village and Zamin and according to law to pay compensation to the plaintiff for the trees cut, had not done so. The defendants denied having cut the trees and the custom alleged in the plaint and claimed the ownership of the trees. They further contended that the value claimed was excessive. The District Munsif found that the alleged cutting was true and that the value claimed was proper for the trees, viz., Rs. 3 and Rs. 6 and that the holding consisted of trees which were assessed to *tirva.* On the third point, viz., 'Whether the alleged usage was true and what relief was plaintiff entitled to? the District Munsif held that the proper amount of compensation would 'ordinarily' be the capitalised value of the annual *tirva,* or twenty-five times the annual *tirva.* The findings on the first two points being in plaintiff's favour, the only question for decision in these petitions is whether the method of calculating compensation adopted by the Lower Court is correct."

He then mentions the contention of the defendants under S. 12 of the Act, but he says no more about it. In other words, he seems to stick to his view that the only question left was the valuation question. He criticises unfavourably the Munsif's view of the 25 years' purchase of the rental value of the trees as the proper measure of damages, a result which, he says, he cannot extract from the proof as to custom, and he then remits the case to the inferior Court for findings on the following points:—

"1. Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the defendants, without the permission of the landholder? 2. If so, what is the compensation payable by the defendants?"

The case then went back to the Lower Court. This time there was a different Munsif. He pronounced a very clear judgment. He said:—

"I have to give findings on the following two issues:—

I. Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the defendants without the permission of the landholder?

II. If so, what is the compensation payable to the defendants?

2. Issue No. I:—

"I have heard Mr. T. C. Srinivasa Aiyangar, Pleader for plaintiff, the Raja, at great length. I have approached the question in the light of the observations contained in the judgment of High Court. I would find the issue in the negative.

"Issue No. II requires no finding in view of my finding on issue No. I."

He also takes no notice of the Act, but assumes that he had been told that the Zamindar's only right to compensation rests on a custom to receive it.

On the return to the High Court of the findings, the Zamindar presented a note of objections. In these objections he, for the first time, raised definitely the true case as to the application of the Act:—

"4. The District Munsif erred in throwing the onus of proof on the plaintiff.

"5. The District Munsif erred in assuming that the Estates Land Act had any application to the present case."

The case was then resumed by the High Court with the returned findings and the objections thereto. They, in all the cases, set aside the decree of the Lower Court and dismissed the suits. They granted the respondents their costs in the High Court; in one case they directed that there should be no costs in the Lower Court, but in all the other cases they were silent as to the costs in the Lower Court. The opinion of the learned Judge who delivered the leading judgment begins with the statement that "the counter-petitioners are the tenants of land on which trees were and are standing." He then goes on to say:—

"The remaining questions for consideration are:—

1. Whether the District Munsif was right in allowing as damages not the value of the trees cut, but only 25 times the *tirva* payable, and

2. Whether plaintiff (petitioner) is legally entitled to claim damages at all, in other words whether the tenants have got absolute right to deal with the trees in any manner without being liable for any damages for so dealing. So far as the first question is concerned, I might at once say that if the tenants are legally liable for damages, they ought to have been made to pay the market value of the trees and not 25 times the *tirva*. But, on the second point, I am of opinion that the defendants are not liable for any damages at all."

After dealing with an argument which seems to have been presented that the right to cut down trees does not include the right to appropriate them, which he negatives, he then comes to the true question of the case. This portion of his judgment must be quoted in full and is as follows:—

"Lastly it was argued that the defendants are not ryots holding lands for agricultural purposes, but that they are merely persons who have been allowed to enjoy the produce of the trees on payment of some remuneration to the landholder which remuneration does not fall within the definition of rent in the Estates Land Act and that therefore S. 12 has no application at all. The muchilikas, Ex. E series, executed by the tenants do not, in my opinion, support this contention. They are all ordinary muchilikas of the kind usually executed by ryots holding land under the Zamindar. The only special feature of these

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muchilikas is that the fixed rent payable by the ryot who holds the land, calculated on the area of the land, which is described as *Regai* punja, is increased by any amount varying with the number and size of the trees in the holding. Under the definition in cl. 1 of S. 3 of the Act, agriculture includes horticulture, and the fact that the rent for the land varies with the number of trees standing thereon does not make the ryot a mere licensee enjoying the produce of the trees under the landlord. He is the occupancy ryot of the land itself with the trees thereon, though paying varying rents according to the number of trees existing on the land. (We were told in the course of the argument that the assessment was arrived once in six years according to the number of trees at the time of the periodical settlement.) Reliance was, however, placed on the decision in *Murugappa Chettiar* v. *Ramanathan Chettiar* (1) for the contention that these were not muchilikas for the land held by an occupancy ryot, but that these are agreements for payment of *vari* or tax payable in respect of the trees held on tree pattas. We have not before us the muchilika executed in that case and if, on a consideration of the terms of that muchilika, it was held that it was an agreement by a licensee to pay *tirva* for enjoying the produce of trees without any *kudiwaram* right in him in the land on which the trees stood, I accept (if I may say so with respect) the correctness of that decision. But, as I said, I am satisfied in this case that the land itself on which the trees stand is held on patta, though the rent payable for that land varied with the number of trees standing on it, owing to a certain amount (varying according to the number of trees) being added to the invariable rent based on the extent of the land. Therefore, the Estates Land Act does apply to the relationship of landlord and tenants in this case."

Spencer, J., concurs and says as follows:—

"The suggestion that S. 12 of the Madras Estates Land Act does not apply in this case was put forward on the assumption that the pattas in the suits were purely tree pattas and not pattas for land. But a reference to the muchilikas on the record shows that this is not the case. I agree with my learned brother both on the general question as to the effect of S. 12 of the Madras Estates Land Act, and as to the order to be passed in particular cases."

It is, therefore, quite clear that the case has been decided upon the ground that the ryots were holders of land on which trees stood, that they had cut trees standing on their own holdings, and that they had the right so to cut them in respect of S. 12 of the Madras Act. It is clear also that, had the tenants' right to the trees not depended on the fact that the trees stood on their holdings, but had depended on a separate lease of the trees as trees, whether trees stood on their holdings or on the holdings of other persons, the learned Judges would have come to the opposite conclusion and would have held that the damages for illegal cutting were to be measured by the value of the trees so cut and, lastly, it is clear that the reason that they held that the trees in question were held as part of the land holdings and not in respect of a separate title was not in respect of any local knowledge as evidenced by proof led, but

1. (1914) 1 L W 881.

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because they determined the fact as a matter of construction of the leases in question of which the muchilikas or tenants' counterpart were produced. Their Lordships are in entire concurrence with the learned Judges as to the result in law if the trees are held on what may be called separate title. In such a case S. 12 of the Madras Act does not apply, and they think that the case cited of *Murugappa* (1) was rightly decided. They think also that the result that follows was rightly affirmed by the learned Judges, *i. e.*, that the full value of the trees which had been illegally cut must be paid for.

But their Lordships are quite unable to concur with the reasons of judgment on the further point. From the reference made to the Ex. E series of the muchilikas it would seem as if the learned Judges had exclusively directed their attention to a case where there is both land and trees which are included in the lease. In one case at least, by a comparison and reference, perhaps it is possible to infer that some at least of the trees are on the land let, but that is not the case with all. Moreover there are a large number of muchilikas which deal with trees and trees alone. How can it be possible to deduce from this, as a matter of construction, that these trees are on a land holding of the person to whom the tree right is granted? How can it be told that he holds any land at all? It is matter of common knowledge—and the case already mentioned is an instance—that, in view of the known use of the palmyra tree, leases of what are only the usufruct of the trees as such are granted. Many of the muchilikas produced point to such a lease. But in the judgment they have all been compelled to suffer the fate of the muchilika, which is above mentioned. If the judgment stands it would be very far reaching and, in granting leave to appeal to the King in Council, the learned Judges seem fully to appreciate that fact. In their Lordships' view, the facts on which the case depends have not been properly found one way or other.

There are just three situations in which palmyra trees may be held:—

1. They may simply be growing on land which is held by a ryot, though no mention of trees be made in any lease.

2. They may be growing on land held by a ryot, but they may be let as a separate entity in his lease.

3. They may be let to a person on whose land they do not grow.

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Assuming trees to be cut without the leave of the land-holder the position in law as regards 1 and 3 seems simple.

As regards 1, S. 12 of the Act of 1908 applies and the landholder has no claim.

As regards 3, S. 12 of the Act of 1908 does not apply and the landholder has a claim for the full value of the trees so cut.

As regards 2, their Lordships will not express an opinion because, as yet, there is no determination of the question so far as they know, by the Courts in India, and they would wish such a determination before coming themselves to a conclusion.

But as regards the cases in this appeal, there are no materials for ascertaining positively in regard to the 30 separate cases in which of the three categories each case falls. They cannot be taken in a block. Each case stands on its own facts. Their Lordships have, therefore, come to the conclusion that these cases must go back to the Courts in India to determine on evidence of fact in each particular case into which category it falls and, in accordance with that determination, to pronounce or refuse decrees in each particular case. As regards costs, for the reasons stated in this judgment, their Lordships consider that the confusion into which the cases have fallen is largely due to the inadequate pleading of the plaintiff. At the same time the defendants ought not to have denied the cutting—a fact which has been determined against them. Their Lordships, therefore, think that the case should be remitted as aforesaid, that the respondents should have the costs of the appeal before this Board, and in each of the Courts below, except the costs of the original inquiry before the first Munsif; that, in that inquiry in the case of all defendants who denied cutting of trees, there should be no costs to either party; and that the costs of the future progress of the case should be determined by the Courts in India. They will humbly advise His Majesty to issue an order in accordance with these views.

*Case remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Narayanaswami Aiyar ... *Appellant** (*Plaintiff*) Narayanaswami Aiyar v. Venkatarama Aiyar.

*v.*

Venkatarama Aiyar and another... *Respt.* (*4th and, 8th defendant.*).

*Estoppel—Mortgagor and mortgagee—Consideration—Vendee from mortgagor's representative—Sale subject to mortgage—Vendee if can deny consideration.*

The owner of a property mortgaged it to another and after his death his widow sold the property to a third person subject to the payment of the mortgage, which was specifically recited in the sale deed. In a suit by the mortgagee for the enforcement of his mortgage, the vendee contended that the mortgage was without consideration. *Held,* as the mortgagor was estopped from raising the question of consideration, the vendee claiming through him was equally estopped from raising the same.

Appeal against the order of the Court of the Additional Subordinate Judge of Tanjore, in A. S. No. 19 of 1924 (A. S. No. 58 of 1923, District Court of Tanjore West) preferred against the decree of the Court of the District Munsif of Tiruvadi in O. S. No. 54 of 1922.

*T. V. Muthukrishna Aiyar* and *V. Subramania Aiyar* for appellant.

*T. M. Krishnaswami Aiyar* and *N. Swaminatha Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—This is an appeal from an order of remand. Plaintiff is the appellant. He is the assignee of a mortgage from the 8th defendant. The 1st defendant's deceased husband mortgaged the suit properties to the 8th defendant for a sum of Rs. 550 under Ex. A dated the 23rd of July, 1909. Later on, the 1st defendant who had become entitled to the properties sold them to the 4th defendant under Ex. D subject to the payment of the suit mortgage, the consideration for which was mentioned as Rs. 550. This appeal arises out of the suit instituted by the plaintiff, the assignee, for the enforcement of the mortgage by sale of the mortgaged properties.

The 4th defendant contended that the mortgage was not supported by consideration. The District Munsif held that he was estopped from questioning the consideration for Ex. A.

*A A O No. 361 of 1924. 19th January, 1926.

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The learned Subordinate Judge on appeal held that there was no estoppel and remanded the suit for trying the question of consideration.

The contesting respondent has taken a preliminary objection that no appeal lies against the order of remand, inasmuch as the decision of the case by the District Munsif was not based upon a 'preliminary point.' It is true, as pointed out by him, that the District Munsif has referred to the evidence regarding consideration in paragraph 10 of his judgment, but it is clear from the records—and this is pointed out by the Subordinate Judge also—that the District Munsif did not give an opportunity to the 4th defendant's vakil to cross-examine the witnesses on the question of consideration or to tender any evidence in support of his contention, obviously on the ground that he was estopped from impeaching Ex. A. In these circumstances, we are satisfied that the District Munsif rested his decision on the 'preliminary point' of estoppel and thus disallowed evidence on the main issue. An appeal, therefore, lies against the order of remand.

The main question for decision is whether the 4th defendant is estopped from questioning the consideration for Ex. A. At the very outset it may be mentioned that neither the first defendant nor the 8th defendant denies the consideration for the suit mortgage. It is argued by the learned vakil for the appellant that the 1st defendant who occupies the position of the mortgagor is estopped from raising the question of consideration and that, since the 4th defendant claims the suit properties through her as his vendor, the plea of estoppel operates equally against him. In *Bickerton* v. *Walker* (1), it was held that "where a deed of conveyance—whether by way of mortgage or otherwise—contains within itself a receipt for consideration money, or has a receipt indorsed upon it, the vendor or mortgagor is estopped as between himself and a person who innocently acts upon the faith of such a representation from averring that a less sum or no sum at all has been received by him." (*See* Halsbury, Vol. XIII, p. 371, Paragraph 523). As pointed out by Fry, L. J., in that decision, so in this case the mortgagor allowed the mortgagee (8th defendant) to have possession of the deed containing the statement that Rs. 550 was the consideration for the mortgage and the plaintiff "must be taken to have advanced his money on the faith of the production of the mortgage deed." The mortgagor being thus clearly estopped from raising the

1. (1885) 31 Ch. D 151.

Narayana-swami Aiyar v. Venkata-rama Aiyar.

question of consideration for Ex. A, we think that the vendee, the 4th defendant, who claims the property through the mortgagor is also equally estopped from raising the same question. In *Shailesh Chandra* v. *Bechai* (2) it was held that a transferee of a portion of mortgaged property is not competent to avoid a deed on the ground of undue influence exercised on the mortgagor when the mortgagor himself did not at any time avoid the contract, nor did he seek to do so in the suit brought against him and the transferee on the deed.

On behalf of the respondent Mr. Krishnaswami Aiyar relies on a decision in *Izzatunnissa Begum* v. *Partab Singh* (3), in support of the argument that the plea of estoppel does not operate against the 4th defendant. In that case it was held that the owner of properties sold subject to incumbrances which were afterwards declared void would not be entitled to claim from the auction-purchaser the incumbrance amounts. This decision has absolutely no bearing on the question raised before us. In reply to the plea that the auction-purchaser was estopped from contending that he was not bound to pay the incumbrance moneys, their Lordships pointed out, "There is nothing in the circumstances of the case to raise an estoppel against the appellant," meaning thereby that no representations affecting anybody's conduct could be supposed to have been made by the auction-purchaser. In the present case the 4th defendant is estopped not by any representations or admission which he has himself made but by representations or admission made by the mortgagor (now represented by the 1st defendant) through whom he claims title to the mortgaged properties.

In this view, it follows that the 4th defendant is estopped from raising the question of consideration and, as all the other issues have been decided in favour of the plaintiff, we think the plaintiff is entitled to get the decree passed in his favour by the District Munsif for the sale of the B Schedule properties. Setting aside the order of the Lower Court we therefore restore the decree of the District Munsif with costs here and in the Court below.

T. S. V. *Appeal allowed.*

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2. (1924) 40 C L J 67. 3. (1909) I L R 31 All 583 : 19 M L J 682 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Krottapalli Gopalam ... *Appellant** (*1st Defendant*)

*v.*

Myneni Suryanarayana and others ... *Respondents* (*Plaintiffs and 2nd Defendant.*)

Gopalam *v.* Suryanarayana.

*Arbitration—Award—Jurisdiction to decide—Matters not referred—Personal knowledge—Decision based on—Effect of.*

Where an award is challenged on the ground that it deals with subjects which were not referred to arbitration, the Court must scrutinise the language of the reference to see if the matter decided was in truth referred to the arbitrators for decision. It does not matter whether or not the arbitrators genuinely believed the matter was referred and the final decision lies not with them but with the Court.

An award based on the personal knowledge of the arbitrators is bad. Though personal knowledge does not of itself disqualify an arbitrator from acting as such and may even be a good reason for his being selected, no arbitrator has a right to decide a matter on his personal knowledge, unless the parties expressly consented to such a course. Case-law referred to.

Appeal against the decree of the Court of the Additional Subordinate Judge of Bapatla dated the 23rd February, 1924 in O. S. No. 44 of 1923 (O. S. No. 28 of 1923 of the Sub-Court, Bapatla).

*T. V. Ramanatha Aiyar* and *T. V. Venkatarama Aiyar* for appellant.

*Ch. Raghava Row* for respondents.

The Court delivered the following

JUDGMENT:—This appeal is against a decree of the Lower Court confirming an award. The 1st defendant and Sriramulu, the husband of 2nd defendant were brothers. It was alleged by the plaintiffs that 1st defendant's father Venkayya brought his sister's son Nagayya, the father of plaintiffs 1 to 3 into the family as *illatom* son-in-law, promising him a share in the family property sanctioned by usage to a person in his position; that, when Sriramulu died early in 1923, the plaintiffs claimed their share from the 1st defendant and the 2nd defendant also claimed maintenance, that these two disputes were referred to arbitration, the arbitrators being P. Ws. 1 to 4 and D. W. 1 and that the arbitrators passed an award Ex. A, giving to the plaintiffs a third share of the family property and to the 2nd defendant certain land

*A A O No. 167 of 1924. 27th January, 1926.

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for maintenance. The 1st defendant refused to carry out the first part of the award and the plaintiffs sued to enforce it. The Lower Court passed a decree in their favour and the 1st defendant appeals. The 1st defendant challenges the legal validity of the award on two main grounds: first, that the matter of the plaintiffs' claim to a share in the family property was never referred at all; and secondly, that the award is vitiated because the arbitrators have relied on their own personal knowledge and not on evidence given before them for the decision of the case. We shall deal with these points in order.

The first point has to be decided on the terms of the reference which is Ex. B. It runs:

"As first Nagayya, the father of one of us, Suryanarayana and later my younger brother Anjayya were being kept in the house of the late Venkayya for conducting the duties of the house and as the wife and heir of the late Sriramulu the elder brother of one of us, Gopalam, had claimed proper maintenance for her livelihood, etc., and so we are disputing about this affair, we both desire that you should act as *panchayatdars* and settle the above disputes between us."

It is signed by the 1st plaintiff, the 2nd defendant and the 1st defendant. It is evident that the only matter mentioned in it as a claim of any kind is the maintenance affair of the 2nd defendant. But the plaintiffs urge that the mention of Nagayya and Anjayya being kept in the house was made because there was this other claim by the plaintiffs to a share and that, because of that mention of these facts the Court is to infer that the other claim was not only advanced by them but was specifically referred for arbitration. It was also emphasised for the plaintiffs that the word 'disputes' is in the plural and therefore there must have been more than one dispute. It is further urged that if Ex. B is obscure because of ambiguity, it is permissible to take and consider extraneous evidence as to what was really referred; and the plaintiffs urge that that evidence is wholly in favour of their interpretation of Ex. B. Now Ex. B is clear and quite intelligible as it stands. The fact that there is no very convincing reason appearing in it for inserting the statement about the 1st plaintiff's father and brother being kept in the house is not a ground for holding that the document considered as a reference is obscure. Nor is a Court entitled to speculate as the Lower Court has done on what must have been the reasons for the

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insertion of this statement. As to the use of the plural disputes,' even if the plural was designedly used—and that is a considerable assumption—the document itself says that the 2nd defendant was claiming livelihood, etc., so that the plural may legitimately be used of her claims alone. It is difficult to believe that, if this was a deliberate document as it is claimed to be, setting out what were the disputes to be settled the statement of claim by the plaintiffs for a share in the family property, which was the more important of the two claims should have been omitted altogether, if it really had been referred, unless the omission was deliberately made with intent to deceive the 1st defendant who is an illiterate man.

We further think it is a case where the language used is plain in itself and applies accurately to existing facts. Under S. 94 of the Indian Evidence Act extraneous evidence cannot be given to show that it was not meant to apply to such facts. Even if the extraneous evidence is considered, it does not seem to us to help the plaintiffs' case. The arbitrators who were examined as witnesses 1 to 4 for the plaintiffs are agreed that all the parties and themselves met before Ex. B was drawn up and agreed as to what were the disputes to be settled. It is said that both the claim of the plaintiffs and that of the 2nd defendant were matters for settlement and they sat down and formally drew up a reference. It is not the plaint case that there was any reference outside Ex. B of any dispute which Ex. B does not mention. It is their case that Ex. B covered everything that was referred to arbitration. See paragraph 5 of the plaint. Now P. Ws. 1 to 4 all agree that it was not written in Ex. B that there was a dispute raised by the 1st plaintiff for a share in the properties and none of them can explain why. "We did not" says P. W. 3, "so clearly examine the wording of Ex. B." There is therefore no evidence in support of the plaintiffs' case that there is latent in Ex. B a claim by the plaintiffs for a share in the property. It may of course be that the arbitrators genuinely thought that this other dispute had been referred to them; but that will not give them jurisdiction to decide a matter not referred. Considering the language of Ex. B we are clear that it lay on the plaintiffs to show that Ex. B does contain a reference of this claim to arbitration and that the 1st defendant put his mark on it with the knowledge that it did. We are unable to hold that the language of Ex. B could in any way convey to him that this other claim had also been referred to arbitration.

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It is not without significance that the plaintiffs have not examined the attestors or the writer of Ex. B. The arbitrators are no doubt good enough witnesses in their own way, but they are not likely to put forward a view that a matter disposed of by them was not within their jurisdiction. The evidence of the attestors and the writer would be that of more independent witnesses on this part of the case and it has not been put forward. It may be remarked also that the 1st plaintiff himself has not gone into the box to speak to his case. This is important in view of the argument put forward by him that there was no reason why he should have signed Ex. B if some claim of his had not been referred. He has not gone into the box to tell us why he signed it and submit to cross-examination on the point. The defence suggestion is that he signed it in order to support the claim of the 2nd defendant who is his own sister and a gosha woman.

The evidence of P. Ws. 1 to 4 is also further shaken by the fact that they do not agree as to whether the plaintiffs' claim put forward just before Ex. B was written was for himself only or for his family. There is nothing whatever in Ex. B to show that there was any dispute about the claim of the plaintiffs' *whole family* to a share. It is clear that even the arbitrators did not clearly realise the exact nature of the claim which, they now say, was so clearly referred to them. Although the 1st defendant's evidence in the Lower Court is not very satisfactory and he is obviously endeavouring to improve his case by denying that Ex. B was read to him and maintaining that he was not present when it was drawn up, Ex. C-I his statement before the arbitrators, only three days after Ex. B, makes it clear that to his knowledge the dispute that he had with the plaintiff was as regards the maintenance claim. There is nothing in Ex. C-1 to indicate that he was aware that Ex. B embodied a reference on any other point. As we have already said, if all the parties at the time of writing Ex. B were agreed that there were two claims referred the more important being the plaintiffs' claim for a share of the family's property, it is incredible that, while the second and less important claim is categorically put down, the other and more important one should have been omitted. To our minds Ex. B only mentions one person who wants or claims anything and that is the 2nd defendant, and we can see no good reason for holding that, when the 1st defendant put his mark to it, he was consenting to refer also the matter of the claim of the plaintiffs to a share.

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The principle on which such cases have to be decided is clear. Firstly, it must be clear that the dispute has been referred before the arbitrators get jurisdiction to decide it. See *In re Arbitration Act* (Indian): *Atlas Assurance Company, Ltd.* v. *Ahmedbhoy Habibbhoy* (1). Courts no doubt will not be unreasonable or unduly technical in construing documents drawn up by persons not familiar with law and legal phraseology: but at the same time the Court must be satisfied by the language used that a matter decided was in truth referred to the arbitrators for decision. It does not matter whether or not the arbitrators genuinely believed the matter was referred and therefore hold an inquiry about it, if in fact it was not; or that they genuinely believed that one of the parties had agreed to refer the matter if, as a matter of fact, he had not; and the final decision as to whether the particular matter was referred or whether a particular party had consented to refer it lies not with the arbitrators but with the Court. This is not a case in which the reference is wide enough to include in the matters referred the question whether or not this particular dispute was within the submission. There is no wide language used at all, the language is restricted and definite. In such a case it is the Court which has to decide whether the matter in respect of which the suit is brought is one which was agreed to be referred. For the above reasons we must hold that this dispute about plaintiffs' share was not referred and therefore the arbitrators did exceed their jurisdiction in deciding it.

As to point (2) namely, whether the arbitrators disposed of the case on personal knowledge, we think that also is a good ground of attack on the award. It is clear from the evidence of P. Ws. 1, 2 and 3, all arbitrators, and from the wording of the award and the statement of reasons in the award which precedes the words "Therefore we decide accordingly" (that is, that the plaintiffs' family should have a third share in the property), that the decision of the arbitrators purports to have been based only on their personal knowledge. It is clear further from P. W. 3's evidence that he had no personal knowledge of these matters at all and that he merely accepted his knowledge from P. Ws. 1 and 2. Thus the award was passed on the personal knowledge of P. Ws. 1 and 2 and the acquiescence of P. W. 3 in their opinion based on their personal knowledge. None of them decided on the evidence and P. W. 3 decided on what P. Ws. 1 and 2 who

1. (1908) I L R 34 Bom 1.

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were not witnesses in the case told him. This procedure also vitiates the award. It is true of course that personal knowledge does not of itself disqualify an arbitrator from acting as such and may even be a good reason for his being selected; but, unless the parties expressly consent to such a course, no arbitrator has a right to decide the matter on his personal knowledge. That knowledge may be of use in enabling him to understand and appreciate the evidence; but he is not entitled to use it to repudiate the case put forward before him by any of the parties and his decision must be on the evidence and not on his personal knowledge. Still less has any arbitrator a right to accept and adopt as his own the purely personal knowledge of other arbitrators. Such a course was the more flagrant misconduct in this case as the award was passed by a majority of one, the one being the arbitrator who took his knowledge at second hand not from the witnesses but from his fellow arbitrators. That is, the decision was really only by two arbitrators and that on their personal knowledge only.

It is clear that the award was not passed on a consideration of the evidence in the case and that is enough to vitiate it. [See *Chintalapudi Sanyasa Rao* v. *Chintalapudi Venkata Rao* (2) and the cases quoted therein, *Palavesam Chetty* v. *Narayana Aiyar* (3) and *Lakshmi Narain* v. *Sheonath Pande* (4)]. The case in *Ramdari Sahu* v. *Ram Charitter Sahu* (5) relied on by the plaintiffs is not on all fours. The case in *Maung Shwe Hpu and two* v. *U Min Nyun* (6) is relied on by the plaintiffs; but if that decision means that, where arbitrators have held a private enquiry of their own, their award is not vitiated unless it can be shown that they have used the results of their enquiry in coming to their conclusion—a matter extremely difficult to prove, we are not prepared to agree. It would open a very wide door for misconduct and such a principle seems to us to be opposed to the principle laid down in *Dobson* v. *Groves* (7), which is that it is only by express agreement of parties that arbitrators are entitled to decide a case on their own personal knowledge. Here there is no such agreement but rather one to the contrary since the parties in Ex. D expressly declared therein their consent to the decision being based upon their statements alone.

2. (1922) 44 M L J 263.
3. (1925) 49 M L J 115.
4. (1919) I L R 42 All 185.
5. (1910) I L R 38 Cal. 143.
6. (1925) I L R 3 Rang. 387.
7. (1844) 115 E R 239.

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In conclusion, therefore, the award, in so far as plaintiff in this suit seeks to enforce it is bad and cannot be supported. and we reverse the finding of the Lower Court on this issue (2). The award so far as it decides the question of 2nd defendant's maintenance, being not attacked will stand. The other issues now fall to be tried and the suit is remanded to the Lower Court for this purpose. 1st defendant will get his costs in this Appeal from the plaintiff. No costs to 2nd defendant.

T. S. V. *Appeal allowed in part.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

Addepalli Venkata Gurunadha Rama Seshayya ... *Appellant** (*Plaintiff*)

*v.*

Sri Tripurasundari Cotton Press, Bezwada, represented by the Secretary, Addepalli Venkatappayya ... *Respondent* (*2nd defendant*).

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*Limitation Act, Arts. 62, 115, 116 and 120—Limited company—Shareholder—Suit for dividends—Period of limitation—Nature of the claim—Liability if contractual—Registered—Meaning of.*

A suit by a shareholder in a limited company for the amount of arrears of dividend due to him falls under Art. 120 of the Limitation Act and not under Arts. 62, 115 or 116. The scope of the several articles discussed. The claim of a shareholder for dividend is merely a claim for debt, and does not arise out of a contract as contemplated and envisaged by Art. 115.

The word "registered" in Art. 116 of the Limitation Act refers only to the Registration Act and does not include the deposit of the Memorandum and Articles of Association of a company with the Registrar of Joint Stock Companies under the Companies Act. *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty,* I L R 42 M 33 : 35 M L J 256 overruled.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Wallace in S. A. No. 593† of 1921 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 22 of 1920 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 112 of 1917.

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*L P Appeal No. 35 of 1924. 28th October, 1925.

†The Judgment of Wallace, J. is reported in 46 M L J 563.

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*K. N. Rajagopala Sastri* for appellant.
*P. Satyanarayana Rao* for respondent.

The Court (Venkatasubba Rao and Madhavan Nair, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

*Venkatasubba Rao, J.*:—This is a letters Patent Appeal from the judgment of Wallace, J. One Subba Rao was a shareholder of the 2nd defendant company. A money decree was passed against him and in execution of it certain shares belonging to him together with the dividends that had accrued were attached and sold. The plaintiff who became the purchaser at the Court-sale has instituted the present suit for the recovery of the dividends. The short question to be decided is: What is the article of the Limitation Act that is applicable to the case? The defendant company contends that the period of limitation is three years, whereas the plaintiff urges that the period is six years. Wallace, J. was of the opinion that the suit would have been in time had the plaintiff been a shareholder but that the plaintiff would not fall under that article. The ground of his decision is that *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1), which lays down that a suit for return of deposit is governed by Art. 116 is inapplicable, if the suit is brought not by a shareholder between whom and the company there is a contractual relation but by a transferee from such a shareholder. With great respect, I am unable to agree. Art. 116 applies to a suit "for compensation for the breach of a contract in writing registered." The article does not say that the suit must necessarily be by the promisee against the promisor; if, for instance, the claim is founded upon a registered bond, can it be said that a suit by a transferee from the payee under the bond does not come under this article? The suit being for a dividend that has accrued, is in the nature of a claim for money due and the position of the transferee for this purpose cannot be different from that of the shareholder himself.

The case cannot therefore be distinguished as has been done by Wallace, J. from *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1).

In my opinion the real question that arises is: Does Art. 116 apply at all? In other words, does *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1) correctly state the law?

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1. (1918) I L R 42 Mad 33 : 35 M L J 256.

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Sir John Wallis, C. J. and Seshagiri Aiyar, J., held in it that a suit by a shareholder against a company is governed by Art. 116. With the utmost respect for the learned Judges I feel bound to say that this decision is based on a fallacy. Art. 116 applies to contracts in writing registered. Is the contract between the shareholder and the company a contract of this description? The learned Judges having held that the memorandum and the articles of association constitute the contract between the shareholder and the company, took the view that these two documents must be deemed to registered within the meaning of Art. 116. Is this construction correct? The word "registered" has not been defined in the Limitation Act but its definition is to be found in the General Clauses Act of 1897. Section 3, cl. 45, of that Act says:—" 'Registered' used with reference to a document shall mean registered in British India under the law for the time being in force for the registration of documents." Can it be said that the Indian Companies Act embodies any portion of "the law for the time being in force for the registration of documents?" The Act deals with the registration of companies and not registration of documents. Section after section refers to the registering of a company. Section 2, cl. 2, defines a company as one registered under the Act. S. 2, cl. (15) defines the "Registrar" as a Registrar performing under the Act the duty of registration of companies. Section 4 prohibits certain partnerships unless they are registered as companies. Section 11 aims against the registration of companies by names identical with those of companies already in existence. Section 248 provides for the establishment of registration offices and deals with the offices where companies shall be registered. It is unnecessary to refer to further sections, but it is clear beyond doubt that it is the registration of companies and not of documents that is within the purview of the Indian Companies Act.

It is no doubt true that in a few sections the word "registered" is used with reference to the memorandum and the articles of association. After dealing with the registration of these documents (Ss. 17, 18, 22 and 23), the Act proceeds to enact in S. 24 that a certificate of incorporation shall be conclusive evidence that the Association is a company registered under the Act. But registration of the articles and memorandum is merely incidental and the object to be achieved is the registration of the company. It is not sufficient to say that in the Indian Companies Act there are some stray provi-

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sions that deal with the registration of certain documents. The real question is: Does the Indian Companies Act contain any portion of "the law" as contemplated by the General Clauses Act "for the time being in force for the registration of documents?"

I have so far applied a negative test. Where is this law then contained? If we now turn to the Registration Act of 1908 we find the preamble running thus:—

"Whereas it is expedient to *consolidate* the enactments relating to the registration of documents, it is hereby enacted as follows."

It is the Indian Registration Act therefore that contains "the law for the time being in force for the registration of documents." It is needless to point out that this Act does not deal with the registration of memoranda or articles of association.

The view I have taken derives some support from Art. 112 of the Limitation Act which gives the period of limitation as three years for a suit to enforce a call by a registered company. If in the opinion of the legislature, enforcing a call is enforcing an obligation arising under a registered contract, a period of three years would not have been prescribed. For, under Art. 116 when any contract (whatever its nature may be) is in writing registered, the period of limitation is six years. See *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (2). The general policy of the Act is to prescribe the longer period in the case of obligations arising under a registered contract. If, therefore, Art. 112 in truth refers to such an obligation, the position will be this: Art. 112 will stand apart and be inconsistent with the general scheme and policy of the Act. From this it is a fair inference that the idea underlying Art. 112 is that the obligation in respect of a call does not arise under a registered contract. This article also incidentally shows by its wording that what is registered is the company and not the articles or memoranda.

S. 116, therefore, of the Limitation Act cannot apply to a suit by a share-holder against a registered company. The learned Judges who decided *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1) came to the opposite conclusion as they felt that a narrow interpretation should not be put upon the words in the General Clauses Act. When two interpretations are possible, one narrow and the other a

1. (1918) I L R 42 Mad. 33 : 35 M L J 256.
2. (1916) I L R 44 Cal 759 : 32 M L J 357 (P C).

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liberal one, I should certainly not have the slightest hesitation in adopting that interpretation which accords with justice. But I cannot help feeling in the present case that the construction suggested on behalf of the plaintiff is utterly unsound. It is with the greatest reluctance that I feel compelled, departing from the authority cited, to adopt a view which gives the shorter period of limitation.

The plaintiff's learned vakil suggests that if Art. 116 does not apply, Art. 120, the residuary article governs the case. I cannot accept this contention. Art. 115 applies to suits for compensation for the breach of a contract not in writing registered. It is contended that the memoranda and articles do not constitute a contract between the company and its members. In *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1), it was held that the obligation to pay a dividend arises from the contract evidenced by these documents. I am prepared to follow this decision in this respect. S. 21 of the Indian Companies Act runs thus:—

"The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs and legal representatives to observe all the provisions of the memorandum and of the articles subject to the provisions of this Act."

This section is almost identical with S. 14 of the English Act, The Companies (Consolidation) Act, 1908. The contention is that although the section says that there shall be deemed to be a covenant on the part of each *member*, it does not say that the *company* is bound by reason of a contract entered into by it.

There has been a good deal of conflict of opinion in England on this point and Palmer in his "Company Law" deals in Chapter IV with this subject.

In *Welton* v. *Saffery* (3), Lord Herschell observed: "It is quite true that the articles constitute a contract between each member and the company."

Sterling, J., in *Wood* v. *Odessa Waterworks Company* (4) said: "The articles of association constitute a contract not merely between the shareholders of the company but between each individual share-holder and every other."

James, L. J., in *Johnson* v. *Lyttle's Iron Agency* (5), referred to the articles as a contract between the company and the share-holders. It is unnecessary to multiply references

1. (1918) I L R 42 Mad 33 : 35 M L J 256. 3. (1897) A C 299 at 315.
4. (1889) 42 C D 636. 5. (1877) 5 Ch D 687.

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and it is sufficient to refer to the following passage in Buckley's Companies Acts, 1924 Edition, page 28:—

"All the authorities as to whether the articles constitute a contract as between the company and its members were reviewed by Astbury, J., in the recent case of *Hickman* v. *Kent Sheepbreeders' Association* (6) who decided that the result of the apparently conflicting decisions and dicta referred to above was that though the articles can neither constitute a contract between the company and an outsider nor give any individual member of the company special contractual rights beyond those of the members (or, *quaere*, any particular class of members) generally, they do in fact constitute a contract between a company and its members in respect of their ordinary rights as members."

If the articles and memoranda constitute therefore a contract binding on the company as well as on each member, Art. 115 clearly applies to the case and a suit for the recovery of the dividend must be brought in three years from the date when payment becomes due.

As the view I am taking is opposed to that adopted by a Bench of this Court in *Ripon Press and Sugar Mill Company, Ltd.* v. *Nama Venkatarama Chetty* (1) and as the point, I understand, is likely to frequently arise in connection with a company which is now under liquidation, I would refer the following question to a Full Bench:—

Is a suit by a share-holder against a company for recovery of a dividend governed by Art. 115 or 116 of the Limitation Act?

If neither article applies, which is the article applicable?

Madhavan Nair, J.

*Madhavan Nair, J.*—For deciding this Letters Patent Appeal, it has become necessary to consider the question, what article of the Limitation Act governs a suit by a share-holder against a company. In *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1), it was held by Sir John Wallis, C. J., and Seshagiri Aiyar, J., that Art. 116 applies to such a case. Under this article a period of six years is fixed for suits "for compensation for the breach of a contract in writing registered." The learned Judges in *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1), took the view (1) that the memorandum and articles of association constituted the contract between the share-holders and the company and (2) that these two documents must be deemed to be registered within the meaning of Art. 116. Accepting the soundness of the view that the two documents constitute the contract, the learned vakil for the respondent has argued that these two documents cannot be

1. (1918) I L R 42 Mad 33 : 35 M L J 256. 6. (1915) 1 Ch. 881.

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considered to be registered within the meaning of Art. 116. "Registered" according to the General Clauses Act, S. 3; cl. 45, when used with reference to a document, means "registered in British India according to the law for the time being in force for the registration of documents." According to its preamble, the Indian Registration Act contains the law for the time being in force for the registration of documents. That Act does not contain any special provision for the registration of "memorandum and articles of association." Ss 17 and 18 of the Indian Companies Act refer to the registration of these documents and S. 22 says that the Registrar of the province in which the registered office of the company is situate shall retain and register them. The Registrar means a Registrar or Assistant Registrar performing under the Indian Companies Act the duty of registration of companies (see S. 2, cl. (15). S. 23 refers to the effect of registration and S. 24 says that a certificate of incorporation given by the Registrar should be conclusive evidence that the Association is a company registered under the Act. As pointed out by my learned brother, Ss. 2, cls. (2) and (15), 4, 5, 11 and 248 indicate that the Indian Companies Act embodies only the law for the "registration of companies" and not any portion of the law for the "registration of documents," for which provision is made in the Indian Registration Act. The wording of Art. 112 of the Indian Limitation Act suggests that what is registered is the 'company' and not the "memorandum" or "articles of association." No doubt, there are sections, as already mentioned, in the Indian Companies Act relating to the registration of these two documents, but on the strength of those sections which deal only with what may be described as matters incidental to the registration of companies, I do not think it can be said that any portion of the law for the registration of documents for the time being in force is contained in the Indian Companies Act.

If this view is accepted, then Art. 115 of the Indian limitation Act would be the article applicable to a suit by a shareholder against a company, but the learned vakil for the appellant argues that that article is inapplicable because the memoranda and the articles of association do not constitute a contract between the company and its members and that, therefore, the proper article which would govern the case is Art. 120. As regards the question whether the memoranda and the articles of association constitute a contract, there has been some conflict of opinion in England, but the weight of authority is *decidedly* against the view put forward on behalf of the appellant.

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I think it has been rightly held in *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1), that the right to receive a dividend arises out of the contract evidenced by the memorandum and the articles of association.

In the circumstances pointed out by my learned brother, I agree that the opinion of the Full Bench may be invited on the questions proposed by him.

The appeal came on before the Full Bench constituted as above on 27th and 28th October, 1925.

*K. N. Rajagopal Sastri* for the appellant: There is no specific article in the Limitation Act which covers the case of a simple action in debt. (*The Chief Justice.* Is dividend a debt due from the Company?) Yes; it has been so held in (1896) 1 Ch. 559 per Romer, J. The company is not a trustee. The debt becomes payable on the declaration of the dividend. As there is no specific article, Art. 120 applies. (*Beasley, J.* Why not Art. 62?) Because the money out of which the dividend comes was not, at the moment of its receipt, received for the member's use. The company receives profits for its own use. Then the directors (or whoever may be authorized by the articles) decide to devote a portion (or the whole of it) for dividends. Something has to be done with the profits before they become the share-holders' money. Perhaps the whole of it may be set apart as a reserve fund. Unless at the moment of receipt by the defendant the money could be said to be the plaintiff's, and then and there payable, Art. 62 cannot apply. See 40 Mad 291; 45 Mad 648,F B; 13 L W 260. (*Krishnan, J.* If dividends are declared more than 3 years after the receipt of the profits by the company the action might be barred by Art. 62 before the cause of action arose.) That is a reason why Art. 62 should not be applied. (*The Chief Justice.* What article does the defendant seek to apply?) Art. 115. Compensation for breach of contract. (*The Chief Justice.* That cannot include a count for a sum certain. The article obviously applies to actions sounding in unliquidated damages). That view has been taken by several Judges. See 6 Cal. 94, per Garth, C. J.; 3 All 600, per Spankie, J; 15 Cal 221, per Ghose, J, and per Sundara Aiyar, J. in 38 Mad. 972 at 975 where he protests against the contrary view "in all humility". (He was stopped by the Court.)

*P. Satyanarayana Row* for the respondent company:— It is no objection that Art. 115 is worded compensation for the breach of contract. The same language in Art. 116 has

1. (1918) I L R 42 Mad 33 : 35 M L J 256.

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been held by the Privy Council to include sums certain. See 44 Cal. 759, P. C. (*The Chief Justice.* The Privy Council were unwilling to disturb a series of authorities which had the effect of making a longer period of limitation apply.) But the case is an authority on the language of Art. 116. The words in Art. 115 are identical and cannot mean a different thing. Further I contend that Art. 62 applies. The plaintiff need not be in a position to sue at the date of receipt. Money paid under a mistake is money had and received, but plaintiff cannot sue until he discovers the mistake. (*Krishnan, J.* If that case comes under Art. 62, why provide for it in Art. 96?) In English Law there is no distinction. See (1914) A C 398. (*Krishnan, J.* In English Law the starting point for limitation is always when the cause of action accrues; and mistake is a part of the cause of action. Under Art. 62 the starting point is when the money is received. So it cannot cover all cases of money had and received under English Law.) There can be a second notional receipt when the dividend is declared.

*Rajagopal Sastri* (asked to reply on Art. 115): The reasons for the decision in 44 Cal 759, P C do not hold good for extending the same construction to the words in Art. 115. (*The Chief Justice* said that the words being the same in both the Arts. 115 and 116, the Court felt bound to follow the P C decision in respect of Art. 115 also.) Then I contend that Art 115 cannot apply, because here there is no contractual obligation at all. I L R 42 Mad 33 assumes that the obligation to pay dividend is contractual on the part of the company, on the strength of Ss. 11 and 39 of the Indian Companies Act, 1882, now S. 21 of the Indian Companies Act, 1913. That section does not say that the Articles of Association constitute a contract *between* the company *and* the members. It merely says that the articles shall *bind* the company and the members, and, so far as the members are concerned, *as if* they had been *signed* by each member and contained a *covenant on the part of each member* . . . . . . to observe all the provisions, etc. It is not said that the company shall be bound as if it signed the articles, or as if they contained a covenant on its part. The company is bound, of course, by its articles; else I had no case. But it is not bound *contractually* by its articles. It is not so bound as a fact, because the articles are declared to bind it on registration: S. 21; but the company itself comes into existence as a legal entity only on registration: S. 23, Indian Companies Act, 1913. On registration of the articles the

company is born; and how at the moment of its birth *eo instanti*, can it be a contracting party? A person to contract must be *in esse*, at least for a fraction of a second. That is not the case here. So there is no contract in point of fact. Nor does S. 21, Indian Companies Act, say, as a statutory fiction, there is a contractual obligation on the part of company; though it does say so on the part of the members. The section could have run ....... "shall ...... bind the company and the members as if they contained a contract *between* the company and the members." But that is not the language. You cannot extend a statutory fiction. The Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. See per James, L. J. in (1875) 1 Ch. D. 182, 188-9 and in (1881) 17 Ch. D. 746 at 756; and per Earl Cairns in (1884) 9 A C 448, 456. For that you go to the history of the section; the old law, the mischief felt, the remedy in view and the true reason of the remedy. The reason for the section which was first Ss. 11 & 16, English Companies Act, 1862, and now S. 14 of the English Companies Consolidation Act, 1908, is found in *Robinson's Executor's* case (1856) 6 De G M and G 572 (43 E R), where it was held that money due by a share-holder to the company was not a specialty debt, and so not entitled to priority in administration of the share-holder's estate on his death. So six years later, in 1862, the obligation of the member was as if by specialty, in Ss. 11 and 16 of the Comapnies Act, 1862. This priority in administration of specialties has since been abolished by Hindi Palmer's (Administration of Estates) Act, 1869, 32 & 33 Vic. Ch 46: See *Williams* on Executors, Vol. I, Pt. III, Bk. II, Ch. II, S. 3, para. 1; and *Leake* on contracts, 1911 Edn., Ch. II, pp. 89 and 96. Bacon, V. C. points out in (1870) L R 10 Eq. 629 at 631 that it was to get over the difficulty in *Robinson's Executor's* case that the 16th section (Act 1862) was inserted. There was no reason to make it a specialty obligation as regards the company; and it was not so enacted. The English and Irish decisions support this view. In (1870) I R 5 Eq. 65, Christian L. J. held that the obligation to pay dividend on the part of the company was a specialty obligation, *not* because the Act said so (because obviously it did not) but because the share certificate was issued under the seal of the company. The obligation was composite, found in the articles of association and acknowledged under seal in the share-certificate; and because of the seal, of the nature of a specialty.

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This case has been followed in (1903) 1 Ir. Rep. 512 where it was argued for the company: S. 16 (1862 Act) does not make the articles contract under seal binding on the company; and the answer for the share-holder was that because of the company's admission of the right in a share certificate under seal, the right became specialty. See also (1904) 1 Ch. 796 per Byrne, J. to the same effect.

The articles are not a contract. (*Krishnan, J.* They may be varied by special resolution.) Yes; and the new articles will bind the dissenting members also. Yet the other side's contention is that they are a contract. There are *obiter dicta* both ways in various cases—see them collected in Buckley on Companies (1924); Halsbury on Companies, etc. There are only two cases in point. The Court of Appeal decision in (1899) 2 Ch. 80 is clearly in my favour. Buckley, Q. C. said in that case (Arguendo). Every member as a corporator has a right to say to the company "you shall observe these regulations;" but as an individual he is not entitled to say to the company, "this is a contract with me which I can enforce." Lindley, M. R. accepted this contention. The articles are regulations. "That is what they are, call them what you like." The decision in (1915) 1 Ch 881 is against me. It is a single judge's decision and (1899) 2 Ch. 80 is not referred to at all. The difficulties suggested above are not met. It is an empirical attempt to solve a very great conflict in judicial opinion. The case itself may be distinguished on the ground that/there the defendant was a member, and so within the words of S. 14 (English 1908 Act); not, as here, the company itself. I submit therefore Art. 115 Limitation Act cannot apply; and Art. 120 applies.

*P. Satyanarayana Row* in reply: The Irish Cases (1870) I R 5 Eq. 65 and (1903) 1 Ir. Rep. 512 and the English case (1904) 1 Ch. 796 all assume that the obligation to pay dividend is contractual. (*The Chief Justice.* Assume, but not decide.) The question in those cases was whether the obligation was by a document under seal. (Krishnan, J. Is there a difference for limitation purposes between a simple debt and a contractual obligation in English Law?) (Rajagopal Sastri: No. The only distinction is between parol and specialty obligations. The English Civil Procedure Act, 1833, 3 & 4 Will IV, C. 42, S. 3, provides for actions of debt six years after the cause of such action, except when upon

specialty.) (Krishnan, J. so in the English cases it was immaterial whether the obligation was contractual or not, and the point was not considered.) The case in (1915) 1 Ch. 881 is in point and clearly in my favour. (*The Chief Justice.* But not the case of *Baring-gould* (1899) 2 Ch. 80, C. A.)

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Coutts Trotter, C. J.

The Court expressed the following

OPINION:—*The Chief Justice*:—In this case the appellant bought up at a Court auction sale the rights of the judgment-debtor to receive dividends accrued in a limited company of which he was a share-holder. The question that we have to determine, now that the auction-purchaser is seeking to enforce his right against the company, is what period of limitation is applicable to such a claim.

The Indian Limitation Act is one of those unfortunate pieces of Indian legislation which by trying to provide for everything conceivable very often ends by leaving out cases of the most glaring description. I might take this as a very good instance, for there is no article which provides *simpliciter* for a debt due, such a debt as would have been the subject of the old common law action in debt, although, oddly enough, provision is made by Art. 63 "for money payable for interest upon money due from the defendant to the plaintiff;" so that a special article is enacted for the interest and nothing is said whatever about the principal debt. It was suggested that to such cases as this Art. 62 might apply which is "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." The fact is that the money out of which the dividend has to come is received by the company for its own use and put into its own coffers. Then at a later stage in accordance with the articles a dividend is declared by the company in a general meeting on the advice and recommendation of the directors. The very ingenious argument put forward was that as soon as the declaration was made there must be taken to be a notional second receipt by the company, as it were from its right hand to its left, the second receipt to be deemed to be for the use of the share-holders who will be entitled to the dividend. It is sufficient to say that that is the a line of argument which seems quite in conflict with the enactment of the statute as to when the time begins to run, and that is when the money is received, the clear implication being—and it is not inconsistent with the frame of the English cause of action for money had and received—that the

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money must at the time it came into the hands of the defendant have been there and then put into his hands for the use of the plaintiff. It is quite true that in cases where the party aggrieved is ignorant of the facts the time will only begin to run, not when the money was in fact received by the defendant, but when the plaintiff first became aware of it; but that is a matter of procedure which really does not, except for a special purpose, fix the time when the money is to be deemed to be received. I think we are constrained to hold that the original receipt by the company is the only receipt upon which Art. 62 would operate and that as that receipt is not for the use of the plaintiff he cannot be brought within Art. 62.

I now pass to the next suggested alternative which is Art. 115, and that is worded as follows: "For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for;" and if the defendant company can bring itself within the four walls of that article, that carries them home in this case and this action is statute-barred. Were the matter *res integra,* I should myself be strongly inclined to say that an action such as this was not an action for compensation for the breach of any contract. The English and the Irish Courts have quite clearly laid it down that upon the declaration of a dividend a debt immediately becomes payable by the company to each shareholder in respect of the amount of dividend represented by the amount of his holding in shares, and I should have thought therefore that it was not correct to describe the obligation to pay a debt as being compensation for the breach of a contract. But that matter is not *res integra* because it has been dealt with in a decision under the following article, 116 of the Limitation Act, by the Privy Council. That is the case of *Tricomdas Coverji Bhoja* v. *Gopinath Jiu Thakur* (2) and the judgment of the Board was delivered by Lord Sumner. Now the words of Art. 116 are as follows: "For compensation for the breach of a contract in writing registered." In *Tricomdas's Case* (2) the sum of money in issue was arrears of rent due under a registered lease, and the argument that was put forward and which the Board refused to accept was that Art. 110 of the Act specifically provided a period of limitation for arrears of rent, and, that being so, it was immaterial whether the rent was due under a registered or an unregistered lease. The

2. (1916) I L R 44 Cal. 759 : 32 M L J 357 (P C).

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Board rejected that argument on the ground that the words of Art. 116 were not incapable of covering a case of rent due and that a long *cursus curiae* of Indian decisions and the decisions of the Board had construed every possible section that they could with a view to giving favour to registered instruments and prolonging the period of limitation. That appears to us to be a method of approaching the case which is binding on us, and I think we have to say in the case of a debt such as the debt created between company and share-holder on the declaration of a dividend that, if it is a contract at all, the remedy sought is aptly described as compensation for the breach of a contract, express or implied.

The matter does not rest there however, because a very learned argument has been put forward before us, the effect of which is to show that although the declaration of a dividend creates a debt, yet the relation between share-holder and company is not a relationship which could be described as a contractual one. On that point there has been a very great conflict of opinion and divergent views in the English and Irish Courts. I am not a company lawyer and I do not propose to do more than refer briefly to the main views that have been expressed. The whole matter is summed up in the judgment of Astbury, J., in the case of *Hickman* v. *Kent or Romney Mars Sheepbreeder's Association* (6) where he comes to the conclusion that although the articles cannot be held to constitute a contract between the company of the one part and an outsider in his capacity of outsider on the other part, yet as between share-holder and share-holder and share-holder and the company, a contract is in fact constituted. There were many weighty expressions of opinions to the contrary. We have come to the conclusion that the safest course to adopt here is to take the view *Land and Mortgage Corporation* (7) after reviewing the very that the declaration creates a debt. Byrne, J., in *In re Artisan's Land and Mortgage Corporation* (3) after reviewing the very weighty pronouncements in Irish cases which he refers to, holds that it not merely creates a debt but by virtue of the share certificates and the memorandum of articles it creates a specialty debt. Although the Irish Courts, not, I think, Byrne, J., do use language which seems to imply that it is not merely a specialty debt but it is a debt arising out of a specialty contract, we are not really bound to go so far as that. We think that this debt created by the declaration, whether in certain circumstances and for certain purposes it might be regarded as a

6. (1915) 1 Ch. 881. 7. (1904) 1 Ch 796.

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contract, is not a contract such as was contemplated and envisaged by Art. 115 of the Limitation Act. It is difficult enough to regard that form of words as applicable to a claim for rent. It seems to me clumsy beyond anything that is legitimate to allow the claims of a share-holder for his dividend to be regarded as aptly described "compensation for breach of contract, express or implied." In our opinion, it is merely a claim for debt and as, unfortunately, the Limitation Act does not contain a section applicable to debts, all we can do is to fall back on the omnibus Art. 120 and treat this case as one for which no article specifically applicable is prescribed under the schedule.

There is only one other matter that we have to deal with which, in essence, was the start of this whole business. We were referred to a decision of this Court reported in *Ripon Press and Sugar Mill Co, Ltd.* v. *Nama Venkatarama Chetty* (1) a decision of Wallis, C. J., and Seshagiri Aiyar, J. That was a suit for dividend and it was decided that the suit fell within Art. 116. Art. 116 of course speaks of registered contracts and there is no doubt that the learned Judges held not merely that registration of a contract, in the ordinary sense was covered by the article, but the deposit of the memorandum and articles of association of a limited company with the Registrar of Joint Stock Companies under the direction of the Act. That seems to us to be putting an intolerable strain upon the word 'registered' and one which the draftsman of this statute could not possibly be thought to have contemplated. Of course the decision amounts to this, and we find ourselves unfortunately in disagreement with it even on the minor point, that the relation constituted between the share-holder and the company is a contractual relation. We do not even go so far as that, as we wish to limit ourselves carefully, if 'contractual' is taken to mean, contractual in the sense contemplated by Arts. 115 and 116 of the Limitation Act. We therefore are of opinion that *Ripon Press and Sugar Mills Co., Ltd.* v. *Nama Venkatarama Chetty* (1) is incorrectly decided and we think we ought to say so.

The reply to the question submitted to us is that in our opinion Art. 120 is the article that applies.

*Krishnan, J*:—I agree.

*Beasley, J*:—I agree.

T. S. V.

1. (1918) I L R 4 Mad 33 : 35 M L J 256.

## [FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS, MR. JUSTICE KRISHNAN AND MR. JUSTICE RAMESAM.

Jammalamadaka Subbarayudu ... *Petitioner** (*Defendant*)

*v.*

Idupuganti Ramaswami and others ... *Respondents* (*Pltffs.*)

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Subbarayudu *v.* Ramaswami.

*Madras Estates Land Act, Ss. 8, Exception, and 6 (2)—Inam—Surrender by ryot—Kudivaram if "acquired" by inamdar—"Transfer, succession or otherwise"—Rule of* ejusdem generis *if applies—Construction of section.*

In the case of an *inam* village falling within S. 3 (2) (*d*) of the Madras Estates Land Act, a surrender of the lands by the ryot amounts to the *kudivaram* interest being "acquired" by the *inamdar* within the meaning of the Exception to S. 8, so as to remove the lands out of the category of an "estate". The word "acquired" is wide enough to include all cases of the interest of the land-holder and of the occupancy ryot becoming united in the same person; and the words "or otherwise" in S. 8 (1) are not limited to matters *ejusdem generis* with transfer and succession.

S. 6 (2) is not intended to govern the exception to S. 8 or to control its general language.

*Semble*: Abandonment of the *kudivaram* right also stands on the same footing as surrender.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the decree of the Court of the Subordinate Judge of Guntur in Appeal Suit No. 44 of 1922 (A. S. No. 76 of 1922 on the file of the District Court, Guntur) preferred against the decree of the Court of the District Munsif of Tenali in Original Suit No. 1229 of 1919.

*A. Krishnaswami Aiyar* and *Ch. Raghava Rao* for petitioner.

*S. Varadachariar* and *V. Govindarajachar* for respondents.

The Court (Wallace and Madhavan Nair, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Wallace J

*Wallace, J.*—The point for decision in this case is whether the exception to S. 8 of the Madras Estates Land Act applies to the surrender of the *Kudivaram* right by a tenant to his landlord, leading to the result that the land ceases to be part of the estate. The unhappy wording of Ss. 8 and 6 of the Act makes the question a very difficult one to settle, and Benches of this Court have in consequence taken varying views on the meaning of the exception.

*C R P No. 771 of 1923. 8th February, 1926.

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Wallace, J.

The wording of the section as it stands barely makes sense. A captious critic might contend that "shall cease to be part of the estate" means "shall cease to be an inam or the inamdar's property at all" which is absurd. It also seems absurd to speak of the acquisition by an inamdar of the *kudivaram* interest "before . . . the commencement of this Act" resulting in the land ceasing to be part of the estate, when *ex hypothesi* the Act and therefore the definition of "estate" under it were non-existent at the time of the acquisition. And this anomaly applies to the land in this case since the surrender was in 1888. I presume the language is meant to imply in a case of this kind that the land does not form part of the Estate and therefore never was, and never can be, within the operation of the Act.

The real point, however, is whether such a surrender falls within the term "acquired" in the exception. It is argued on one side that "acquired" is confined to the modes of passing of the *kudivaram* right from the ryot to the landholder mentioned in the section (section 8), to which the exception is appended, that is, "transfer, succession or otherwise." It is contended on the other side that the phrase "or otherwise" will include a case of surrender, and that, even if it does not, the language used in S. 66 (2) implies that such a surrender is a method by which the landholder acquires an occupancy right with such effect that he can pass it on to a ryot. To this it is answered that "or otherwise" can only import a species of passing of the *kudivaram* right *ejusdem generis* with transfer or succession, and that the position of the phrase, "surrendered or abandoned" in S. 6 (2), in juxtaposition to "comes into the possession of the landholder," seems to imply that by surrender or abandonment the *kudivaram* right does not come into the possession of a landholder but remains suspended in the air, until another ryot is admitted to the land, and that therefore these terms cannot be methods of acquisition of that right by an inamdar.

It must be admitted that the loose language employed in these sections gives plausibility to either view, and one has to decide the case rather on the broad principles of the sections than on their actual wording. S. 8 as a whole is obviously intended to cover cases in which the occupancy right is transferred to or comes into the possession of the landholder, and to prevent him in such cases from using that merger to destroy the character of the land as ryoti

land. That is, a landlord is forbidden to become his own occupancy tenant. It was evidently considered that in normal cases the landholder would be bound to admit, and would admit, another ryot to the land, and that ryot would by the very fact of admission step into the occupancy right left which the landholder is forbidden to hold as such. But, these are certain exceptions to the rule. One is set out in sub-section (4) by way of giving the landholder some compensation for value spent before the passing of the Act on acquiring the *kudivaram* right, and by way of giving some effect to cases of succession both before and after the Act. The exception to the Act was, I think, intended to exempt inamdars alone among landholders from the application of this principle that the landholder cannot be his own occupancy tenant, and to permit him to be so when the rights of third parties were not adversely affected. The effect of the exception, whatever its language is to take what was ryoti land, in which the inamdar had not, *ex hypothesi* the *kudivaram* right, out of the operation of the Act altogether, when the occupancy right had passed to the inamdar so that it ceased to be ryoti land and the inamdar could henceforth deal with it unhampered by any of the provisions of the Act.

That being so, there seems no obvious distinction in principle between the passing of the occupancy right from the ryot to the inamdar by sale, gift or succession and its passing by a deed of surrender. The test is obviously not the passing of consideration, because in a case of succession there is no consideration. Nor is it a deed of transfer or a voluntary act, because in the case of succession there may be no deed and in the case of an intestacy there is no voluntary act. I would hold then *prima facie* that when a ryot has, by a voluntary act, transferred his right to the inamdar or when the passing of that right is the result of the legal right of inheritance, the inamdar has "acquired" that right within the meaning of the phrase used in this exception. To put it in a different form, the phrase "or otherwise" in S. 8 (1) will include the case of a surrender.

The case of an abandonment is different and more difficult and fortunately we are not concerned with it here. In such a case it is open to argument whether the occupancy right automatically reverts to the landholder at all. That a right of occupancy can remain in suspense vested in no one, but ready to descend on the next comer is apparent from S. 10 (2) and may also be deduced from a consideration of the conception of ordinary unoccupied ryoti waste, the right of occupancy

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to which comes into being on the admission by the landholder of a ryot thereto. I would leave that question open here.

Against the view thus derived from the general scope of S. 8 that the term "acquired" includes all cases whereby the right passes by operation of a legal form of transfer from the ryot to the inamdar we are referred to the language of S. 6(2). It is argued that having regard to that language, cases falling within S. 8 (4) and the exception to S. 8 are species of methods whereby the right of occupancy "comes into the possession of the landholder" and are categorically distinguished from cases of surrender and abandonment. There is much to be said for the view that abandonment is not a method by which that right "comes into the possession of the landholder." But it is difficult to see why surrender, especially a surrender by deed as in this case is not, and I must simply record my opinion that the language of S. 6 (2) was not intended to convey the contrary. It is moreover doubtful if that language does draw the categorical distinction pleaded, for while the essence of the rule laid down in S. 8 (4) is the method of transfer, the essence of the exception is not the method of transfer but the party in whose favour the transfer is made. One cannot reasonably contrast a mode of transfer with a transferee. Again as pointed out by Mr. Varadachari, it was unnecessary to include the exception to S. 8 in S. 6 (2), because by that exception the land is taken out of the operation of the Act altogether and therefore S. 6 or any other section in the Act will not apply to it.

Again, if one gives S. 8 (1) its full meaning and "otherwise" does not include surrender, then any and every landholder acquiring by surrender by which certainly whatever right the occupancy ryot had is passed on to him can hold the land *as a ryot*. This is, I feel sure, contrary to the principles of the Act.

The rulings of this Court have not been uniform on the interpretation of this exception. In *Suryanarayana* v. *Patanna* (1), two learned Judges Sadasiva Aiyar and Spencer, JJ. differed as to whether surrender is included in the word "acquired." In *Ponnusamy Padayachi* v. *Karuppudayan* (2), a third Judge, Miller, J., agreed with Spencer, J., and agreed that surrender is so included. In *Venkata Sastrulu* v. *Sitaramudu* (3) Seshagiri Aiyar, J. agreed mainly with Sadasiva

1. (1913) I L R 38 M 608: 26 M L J 99.
2. (1914) I L R 38 M 843: 26 M L J 285.
3. (1912) I L R 38 M 891: 26 M L J 585.

Aiyar, J. and in *Zamindar of Nuzvid* v. *Lakshminarayana* (4) Napier, J. expressed agreement in this view. That, however, was a case not of surrender but of abandonment, into which, in my view different considerations will enter. In an unreported case, S. A. No. 1244 of 1919, Oldfield, J. adopted the view held by Spencer, J. There is thus a clear conflict of authority; and that being so, I think it is necessary to refer to a Full Bench the question whether the word "acquired" in the exception to S. 8 covers a case of "surrender."

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Wallace, J.

Madhavan Nair, J.

*Madhavan Nair, J.*:—The defendant is the petitioner. The question for decision in this case is whether the suit land is part of an 'estate' within the purview of the Madras Estates Land Act and the suit is not triable in a Civil Court. The Lower Courts have found that the suit village is an estate under S. 3, sub-section (2), cl. (*d*) of the Estates Land Act, and this finding has not been attacked before us. It has also been been found that the *kudivaram* interest of the tenant has been surrendered by deed to the landlord in 1888. The learned vakil for the plaintiffs (respondents) argues that, though ordinarily the jurisdiction of the Civil Court should be held to have been ousted because the suit village is an estate under S. 3, sub-section (2), cl. (*d*), still the Civil Court has jurisdiction, because, by reason of the surrender, the *kudivaram* interest in the village has been acquired by the inamdar within the meaning of the exception to S. 8 of the Act and the land has, therefore, ceased to be part of an estate. It is argued on behalf of the petitioner that surrender is not a mode of acquisition of the *kudivaram* interest within the meaning of the exception.

The short question for consideration is whether the inamdar in this case has acquired the *kudivaram* interest in the suit land within the meaning of the exception to S. 8 of the Estates Land Act. If he did so acquire, the land has ceased to be part of an estate and the Civil Courts have jurisdiction to try the suit. The exception to S. 8 runs as follows: "Notwithstanding anything contained in this section where, before or after the commencement of this Act, the *kudivaram* interest in any land comprised in an estate falling within cl. (*d*) of sub-section (2) of S. 3 has been or is acquired by the inamdar, such land shall cease to be part of the estate." Mr. Krishnaswami Aiyar argues that this provision being an exception to S. 8, the word "acquired" referred to in it must obviously refer to one of the modes of the acquisition of *kudivaram* interest

4. (1921) I L R 45 M 39 at 59: 42 M L J 161.

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contemplated by sub-sections (1) to (4) of S. 8 which do not refer to acquisition by surrender as a mode of acquiring the *kudivaram* interest. Reference has also been made to sub-section (2) of S. 6 of the Act to support the above argument.

Section 8 of the Estates Land Act deals with the merger of occupancy right. Generally stated, sub-section (1) deals with the merger of the entire interests of the landholder and the occupancy right by transfer, succession or otherwise. Sub-section (2) deals with the transfer of the occupancy right in any land to a co-sharer. Sub-section (4) deals with the acquisition by the landholder of the *kudivaram* interest by transfer for valuable consideration or by inheritance. Surrender is not specifically mentioned as a mode of acquisition in the section. The *kudivaram* interest of the tenant acquired in any of the aforesaid ways does not give the landholder any private rights of ownership, unless the land-holder happens to be an inamdar and acquires the *kudivaram* interest in the way indicated in the various sub-sections referred to above. This is the interpretation put upon the exception by the learned vakil for petitioner. Sub-section (2) of S. 6 of the Act relied on in support of this interpretation is in these terms: "where land held by a ryot with a permanent right of occupancy is *surrendered* or abandoned or, save in the cases falling within sub-section (4) of S. 8, and the exception to S. 8, comes into the possession of the landholder......" It is pointed out that in this sub-section acquisition by surrender is put in a different category from the acquisition under the exception to S. 8.

The question is not free from difficulty, but I am inclined to hold that the arguments of the learned vakil for the petitioner should not be accepted. The object of S. 8 is to preclude the landholder, who acquires by transfer, succession or otherwise the occupancy right in a holding, from treating it as his private land and preventing the tenant from acquiring a right of occupancy in it. But an exception has been deliberately made by the legislature in the case of an inamdar whose village is an estate falling within cl. (*d*) of sub-section (2) of S. 3, when he acquires the *kudivaram* interest in any land comprised in the estate. When the intention of the legislature was to show this exceptional favour to inamdars departing from its general policy, I do not see any reason why giving effect to this intention in all its fullness should be defeated by placing a narrow interpretation on the word "acquired" so as to exclude acquisition by surrender. No reason is suggested for

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thus excluding "acquisition by surrender" from the scope of the exception. No doubt, the clause appears as an exception to S. 8; but in giving effect to the intention of the legislature to its fullest extent, it is not right to uphold the narrow construction suggested by the learned Vakil for the petitioner. Even if the exception is to be confined in its operation to the modes of acquisition mentioned in S. 8, it seems to me that the word "otherwise" in the expression "by transfer, succession or otherwise" would include within it, acquisition by "surrender." In interpreting the word "otherwise" it is difficult to apply the *ejusdem generis* principle, for the mere reason that there is no similarity in the two modes of acquisition mentioned, namely, transfer and succession, except that, in the result, the landholder obtains a *kudivaram* interest. The one method denotes a voluntary act and consideration; the other method is purely involuntary and has nothing to do with consideration. In such circumstances, it is difficult to apply the *ejusdem generis* principle of construction in finding out what is meant by "otherwise."

The contrast between the right obtained by the landlord through "surrender" and the right to *kudivaram* obtained legislature intended that, in construing the sub-section (2) of S. 6 of the Act supports to some extent the argument advanced on behalf of the petitioner. Sub-section (2) of S. 6 states that in land surrendered or abandoned by a ryot, a landlord cannot obtain rights of occupancy before the expiry of ten years. It may be, as pointed out by Miller, J., that by referring to the exception to S. 8 in sub-section (2) of S. 6, the legislature intended that, in construing the sub-setcion (2) of S. 6, we should exclude surrender and abandonment from the methods of acquisition by which a landholder may acquire indefeasibly an occupancy right. However that may be, I do not think that it is permissible to adopt a construction of the exception to S. 8 which would, by restricting the meaning of the word "acquired," stultify the intention of the legislature in enacting that exception. The difficulty felt in construing S. 6, sub-section (2) and the exception to S. 8 together is due to the loose language employed in sub-section (2) of S. 6. As pointed out by the respondents' learned vakil, reference to the exception to S. 8 in sub-section (2) of S. 6 is unnecessary because by that exception land ceases to be part of an estate and is thus taken out of the Act altogether and no section of the Act will, therefore, apply to such land.

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The view advanced on behalf of the petitioner finds support in the opinion of Sadasiva Aiyar, J. in *Suryanarayana* v. *Patanna* (1), but Spencer, J. in the same case dissented from this view. Miller, J. in *Ponnuswami Padayachi* v. *Karuppudayan* (2) accepted the view of Spencer, J., while in *Zamindar of Chellapalli* v. *Somayya* (5) Seshagiri Aiyar, J. was inclined to follow the views of Sadasiva Aiyar, J. in *Suryanarayana* v. *Patanna* (1). Napier, J., sitting with Sadasiva Aiyar, J., held that surrender is not a mode of acquiring *kudivaram* interest within the meaning of the exception*. It may be pointed out that this decision deals with lands in a Zamindari. In the latest decision in S. A. No. 1244 of 1919, Oldfield and Spencer, JJ. upheld the view which found favour with Spencer, J. in *Suryanarayana* v. *Patanna* (1). As the Judicial opinion is thus divided, I agree with my learned brother that it is necessary to refer to a Full Bench the question whether the word "acquired" in the exception to S. 8 covers a case of "surrender."

I may state that the question whether abandonment is a mode of acquiring *kudivaram* interest by the inamdar within the meaning of the exception to S. 8 does not arise in this case though Mr. Varadachari for the respondent was willing to concede in the course of his arguments that acquisition by abandonment does not come within the scope of the exception.

*A. Krishnswami Aiyar* and *Ch. Raghava Rao* for petitioner.

*S. Varadachariar* and *V. Govindarajachar* for respondents.

The Court expressed the following

Phillips, J.

OPINION:—*Phillips, J.*:—The question that has been referred for our opinion is whether the word "acquired" in the exception to S. 8 of the Madras Estates Lands Act covers a case of "surrender." That exception reads as follows:—

"Notwithstanding anything contained in this section where, before or after the commencement of this Act, the *kudivaram* interest in any land comprised in an estate falling within cl. (*d*) of sub-section (2) of S. 3 has been or is acquired by the inamdar, such land shall cease to be part of the estate."

It is not seriously disputed that the word "acquired" in its ordinary sense is wide enough to cover a case of acquisition by surrender or abandonment as well as any other form of acquisition. It is, however, contended that in this exception the word must be construed in a limited sense so as to exclude

1. (1913) I L R 38 M 608: 26 M L J 99.
2. (1914) 38 M 843: 26 M L J 285.
5. (1914) I L R 39 M 341: 27 M L J 718.
*I L R 45 M 39 : 42 M L J 161.

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surrender and abandonment, and two grounds are put forward in support of this contention. The first is that, inasmuch as the exception is an exception to S. 8, the modes of acquisition must be limited to those mentioned in S. 8, cl. (1), namely, "transfer, succession or otherwise," and it is argued that these words specifically exclude "surrender" and "abandonment." This was the view taken by Sadasiva Aiyar, J. in *Suryanarayana* v. *Patanna* (1), but Spencer, J. did not agree with him. Since then there has been a conflict of opinion in this Court. Sadasiva Aiyar, J. relied on the decisions of the Calcutta High Court in *Badan Chandra Das* v. *Rajeswari Debya* (6) and *Muktakeshi Dasi* v. *Pulin Behari Singh* (7). The latter purports to follow the decision in the former and contains the remark—

"In construing words like "or otherwise" it has always been held that the matters reserved must be *"ejusdem generis,"* and that is very clearly brought out in the case of *Badan Chandra Das* v. *Rajeswari Debya* (6)."

From a perusal of the judgment in *Badan Chandra Das* v. *Rajeswari Debya* (6) it would appear that the head-note, which runs, "the terms transfer, succession or otherwise" in S. 22 [equivalent to S. 8 (1), Estates Land Act] do not mean and include a "surrender"; the expression "or otherwise" as used in the section means "or in a similar way" is worded in a considerably wider manner than the language of the judgment. As, however, one of the Judges in *Muktakeshi Dasi* v. *Pulin Behari Singh* (7) was a party to the prior decision we must take it that that was the meaning of the latter judgment, but it must be observed that the judgment does not expressly lay down the proposition, which can only be inferred from its general tenour, and there is no argument in the judgment to support such a proposition; similarly the judgment in *Muktakeshi Dasi* v. *Pulin Behari Singh* (7), which purports to follow the former decision, does not contain any argument. One difficulty in the way of construing "or otherwise" as limited to matters *ejusdem generis* is that it is very difficult to imagine what other means of acquisition can be referred to which are of the same nature as "transfer" and "succession," terms which in themselves are extremely wide. Even supposing that the exception to the section must be governed by the first clause thereof, it does not appear that the word "acquired" must be interpreted in a limited sense, so as to exclude surrender and abandonment. However this may be, I am of

1. (1913) I L R 38 M 608: 26 M L J 99.
6. (1905) 2 C L J 570. 7. (1908) 8 C L J 324.

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opinion that the exception, so called, is in effect a substantive provision and there is no necessity to qualify its meaning by the preceding clauses.

The second argument put forward is that the language of S. 6, cl. (2), shows that the legislature intended to exclude "surrender" or "abandonment" from the provisions of the exception to cl. (8). That runs as follows:—

"Where land held by a ryot with a permanent right of occupancy is surrendered or abandoned or save in the cases falling within sub-section (4) of S. 8, and the exception to section 8 comes into the possession of the landholder."

This would seem to draw a distinction between cases of surrender and abandonment and other cases in which the right of occupancy comes into the possession of the landholder. The whole of this provision seems somewhat unnecessary in view of S. 6, cl. (1) which in effect deals with the same subject, but it has possibly been provided *ex abundanti cautela*. Whatever the reason for the provision, the language of a succeeding section, when it is clear in its terms, must be read as it stands, and should not be interpreted in a strained manner merely in order to bring it into consonance with a previous section. There is no ambiguity in the language of the exception to cl. 8 and there is therefore no reason why in interpreting it reference should be made to S. 6 (2). The word "acquired" has a very general meaning and would ordinarily include acquisition by surrender, and the only argument that has been advanced against this proposition is that when a tenancy is surrendered the tenant's rights under the lease are not acquired by the landlord, but they merely cease to exist. Here, however, it is not a question of acquiring the tenancy rights, but it is a question of acquiring the *kudivaram* interest, and that, I take it, means the right of occupancy in the land and not merely rights under a particular lease. If this argument is rejected, as it must be, we have the word "acquired" in its ordinary sense and that is wide enough to include acquisition by surrender. In this reference, acquisition by abandonment has not been dealt with, but so far as the case has been argued before us it would appear that the two modes of obtaining the *kudivaram* right, namely by surrender or abandonment, stand on the same footing.

The question referred must therefore be answered in the affirmative and the Civil Revision Petition will be remitted to the Division Bench for disposal accordingly.

Krishnan, J.

*Krishnan, J.*—The question raised in this reference is whether the exception to S. 8 of the Madras Estates Land Act

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covers a case of surrender or not. It has been answered in the affirmative by Miller, Oldfield and Spencer, JJ. in *Ponnusami Padayachi* v. *Karuppudayan* (2), *Suryanarayana* v. *Pattanna* (1) and S. A. No. 1244 of 1919 respectively, but in the negative by Sadasiva Aiyar, Seshagiri Aiyar and Napier JJ., in *Suryanarayana* v. *Pattanna* (1), *Venkata Sastrulu* v. *Sitaramudu* (3) and *Zamindar of Nuzvid* v. *Lakshminarayana* (4), respectively. It is on account of this direct conflict of opinion that the matter is referred to the Full Bench, and we have to decide it on the section of the Act.

The word "acquired" in the exception which is the word to be construed,it cannot be denied,is of wide enough import to include all cases of acquisition, by surrender, abandonment or otherwise. The word is defined in Murray's Oxford Dictionary as meaning "to gain to obtain, to get as one's own, to gain the ownership of, to come into possession of." Is there any reason then why it should be restricted or cut down in its meaning in the exception? The object of the exception is clearly to exempt inamdars as distinguished from zamindars from the applicability of clauses (1) and (3) of S. 8. There is nothing in the policy of the Act so far as I can see, nor in the language of the exception to restrict the exemption to cases other than those of surrender or abandonment.

It is, however, contended that there are words in S. 8(1) and in S. 6 (2) which necessitate that we should construe the word "acquired" in the exception as not including cases of surrender and abandonment. It is first argued that the word "otherwise" in cl. (1) of S. 8 must be read *"ejusdem generis"* with the preceding words "transfer or succession" and that so read it will not include cases of surrender or abandonment. It is then argued that as the exception in S. 8 is an exception to cl. (1) it should also be read as not including such cases when the clause itself does not include them. The whole of this argument truns upon reading "otherwise" as governed by the rule of *"ejusdem generis."* The word is wide enough to include all cases of the interest of the landholder and of the occupancy ryot becoming united in the same person. To read it as *ejusdem generis* with transfer and succession *thus* excluding cases of surrender and abandonment will lead to the result that the prohibition in it against a landholder holding the land as a ryot will not be applicable to cases where he obtains

1. (1913) I L R 38 Mad. 608 : 26 M L J 99.
2. (1914) I L R 38 Mad. 843 : 26 M L J 285.
3. (1912) I L R 38 Mad. 891 : 26 M L J 585.
4. (1921) I L R 45 Mad 39 at 59 : 42 M L J 161.

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the ryoti interest by surrender or abandonment even when the landholder is a Zamindar. This is clearly incorrect, for cl. (4) shows in what case alone an exception is allowed in the case of Zamindars.

As my learned brother, Phillips, J., observes in his judgment, which I have had the advantage of reading, if the word "otherwise" is limited to matters *ejusdem generis* with transfer and succession, it is difficult to see to what case it can possibly refer. The learned vakil for the appellant suggested that it might refer to cases of acquisition of title by prescription, but they are no more *ejusdem generis* with transfer and succession than surrender can be said to be. I think the argument based on the language of S. 8 (1) is erroneous.

The more difficult point, however, is the one raised on the language of S. 6, cl. (2). That language, it is argued, suggests that the exception to S. 8 does not apply to cases of surrender or abandonment but only to cases where the landholder comes into possession of the land in some other manner as the saving clause which refers to the exception is not applied to cases of surrender or abandonment in the clause. If we read the exception to apply to cases of surrender or abandonment as well, it is argued that there will be a conflict between it and cl. (2). On the other hand if we are to restrict the exception as contended for we will have to read into it the words "otherwise than by surrender or abandonment" after the word "acquired"; there is no warrant for doing this. The words "and the exception to S. 8" in cl. (2) seem to be quite superfluous as by the exception to S. 8 itself such cases are taken entirely out of the Act. It seems to me that S. 6 (2), is not intended in any way to govern the exception to S 8 or to control its general language and that if there is any conflict the exception which refers to inamdars only must be taken to override the general provision in S. 6, cl. (2) which refers to landholders generally, and not *vice versa*.

In the view I take I see no difference between cases of surrender and of abandonment. I agree that our answer to the reference should be that the case of surrender is within the exception to S. 8.

Ramesam, J.

*Ramesam, J.*—I agree.

On 10th March the Division Bench after the Full Bench opinion delivered the following

JUDGMENT:—Following the decision of the Full Bench, this Civil Revision Petition is dismissed with costs.

T. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Narayanaswami Naidu and others ... *Appellants** (*Plaintiffs* 2 *to* 4)

*v.*

Rangaswami Naidu and others ... *Respondents* (*Defendants* 2 *to* 5).

Narayanaswami Naidu *v.* Rangaswami Naidu.

*Civil Procedure Code, O.* 21, *R.* 2—*Applicability—"The decree"—Meaning of—Money to be payable under decree—"Of any kind"—Addition of the words —Object of.*

A razinamah decree provided that in case the defendants paid to the decree-holder a certain sum of money within two years, a certain item of property was to be reconveyed to them and in default the decree-holder was to enjoy the property with absolute rights. *Held,* as the money could not be recovered in execution, the decree was not one "where any money" is payable within the meaning of O. 21, R. 2, and an adjustment of the decree even if it is not certified to the Court can be recognised by a Court executing the decree.

O. 21, R. 2 does not apply to all kinds of decrees whatever be the nature of the relief granted but only to cases where money is payable under the decree, whether they are accompanied by other reliefs or not. The words "the decree" can only mean the decree under which any money is payable. *Gharry* v. *Ghourya,* (1921) I L R 46 Bom 226 dissented from.

History of the section in the various Codes of Civil Procedure traced; the addition of the words "of any kind" in the Code of 1908 explained and the case-law discussed.

Appeal against the order of the District Court of Trichinopoly dated 18th December, 1923 in E. P. R. No. 34 of 1922 in O. S. No. 11 of 1913 on its file.

*S. T. Srinivasa Gopalachari* for appellants.

*L. A. Govindaraghava Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—A Razinamah decree was passed on 22nd October, 1914 in O. S. No. 11 of 1913 in which it was provided that in case the 1st defendant or the 4th defendant were to pay to the decree-holders Rs. 17,000 within two years the property should be reconveyed to the 1st defendant, but if default be made in such payments the decree-holders themselves should enjoy the properties with absolute rights. The plaintiff-decree-holders entered into an agreement on 19th April, 1916 with the 2nd defendant whereby they relinquished their interest in the property for Rs. 7,000. The 2nd plaintiff applied to the Lower Court for execution of the decree. The learned District Judge held that the decree had

*A A O No. 272 of 1924. 5th February, 1926

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been adjusted by the arrangement of 1st April, 1916, evidenced by Exs. A and B and that the 2nd plaintiff was not entitled to execute the decree. He also held that the 2nd plaintiff released his right to the property by another document, Ex. E, dated 15th July, 1922. Against his order plaintiffs 2 to 4 have preferred this appeal.

The contention of Mr. Srinivasagopalachari for the appellants is that the decree was a money decree, and any adjustment out of Court not certified to the Court should not be recognised. The sole question in this case is whether the decree is a decree coming within O. 21, R. 2, Civil Procedure Code. The terms of the Razi decree are such that the plaintiffs could not recover Rs. 17,000 from the defendants if the latter did not choose to pay the amount. There is no decree in favour of the plaintiffs for Rs. 17,000. What is stated in the decree is that if the 1st defendant or the 4th defendant were to pay Rs. 17,000 to the decree-holders they should reconvey the property to the 1st defendant. It is open to the defendants 1 and 4 not to pay the amount in which case the decree-holders will not be bound to reconvey the property. If the 1st defendant or the 4th defendant did not choose to pay the amount to the plaintiffs the decree did not empower them to realise the amount by execution. The decree is not one "where any money" is payable under a decree and therefore does not come within the provisions of O. 21, R. 2.

The next contention is that R. 2 applies to all kinds of decrees whatever may be the nature of the relief granted and reliance is placed upon *Gharry* v. *Ghourya* (1). In that case the learned Chief Justice and Mr. Justice Shah held that R. 2 applied to all kinds of decrees. With very great respect to the learned Judges we are unable to accept this view. There is no discussion in the case of the decisions bearing on the question. The learned Judges contended themselves by merely saying the words, "Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted" as justifying their view, that the words did not confine the provisions of the rule to money decrees and that any decree was provided for. The rule says 'where any money payable under a decree of any kind is paid out of Court' *i. e.* where any money payable under a decree, whatever may be its nature, is paid out of Court, it has to be certified, or if the decree is otherwise adjusted, either in whole

1. (1921) I L R 46 Bom 226.

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or in part that also has to be certified. The words "the decree" can only mean the decree under which any money is payable. The use of the definite article clearly indicates that the decree can only mean a decree where any money is payable, and the rule means any decree under which money is payable whether there be other reliefs or not if adjusted out of Court should be certified to the Court within the time allowed by law. But where no money is payable under a decree as, for instance, in the case of recovery of immoveable property or grant of injunction or any other relief in which the plaintiff is not entitled to enforce by execution payment of money, that decree does not come within the purview of R. 2.

In *Ramakrishna Rao* v. *Bala Krishna Rao* (2) it was held by Oldfield and Seshagiri Aiyar, JJ., that O. 21, R. 2, applied to partition decrees which provided for payment of money as well as other reliefs such as partition of immoveable property and adjustments with regard to such property and that such adjustment could not be recognised unless certified or recorded as required by the rule. The learned Judges considered the previous cases on the point and came to the conclusion that if money was payable under a decree, and if there were other reliefs, any adjustment of that decree out of Court should be certified within the time prescribed and if not certified to the Court, then such an adjustment could not be recognised.

We may briefly refer to the history of the rule in order to understand what it really means. Under S. 206 of the Act VIII of 1859 all adjustments whatever may be the nature of the decree, had to be certified to the Court and any adjustment not certified could not be recognised. The latter portion of the S. 206 was in these terms: "No adjustment of decree in part or in whole shall be recognised by the Court unless, etc." In the Act of 1877, the chapter on execution of decrees was greatly expanded and in some respects altered and S. 258 of the Code of 1882 was practically the same as that contained in the Code of 1877. Under the Code of 1877 it was not necessary that all the adjustments of decrees, whatever may be the nature should be certified to the Court. In *Baba Mohamed* v. *Webb* (3), a Bench of the Calcutta High Court held that the rule contained in S. 258 was applicable to all decrees. The learned Judges observe at page 788 referring to section 258 of the Code of 1877 "that section corres-

2. (1919) I L R 43 Mad 476. 3. (1881) I L R 6 Cal 786.

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ponds in all material respects, and carries with it the same meaning as S. 206 of the former Procedure Code (Act VIII of 1859) which manifestly deals with the adjustment of any decree." Under S. 258 of the Code of 1882 which is a *verbatim* copy of the corresponding section of the Code of 1877 it was held that it applied only to money decrees. That was the view of the Madras High Court in *Sankaran Nambiar* v. *Kanara Kurup* (4). The learned Chief Justice and Mr. Justice Benson held that S. 258, Civil Procedure Code, referred only to the execution of decrees under which money was payable and was not applicable to decrees for possession of immoveable properties. The section was further amended in the present Code by the addition of the words 'of any kind' in order to reconcile the conflicting views of the different High Courts. In *Abdul Latiff Sahib* v. *Bathula Bibi Ammal* (5) it was held by Wallis and Ayling, JJ., that where there was a decree for the delivery of certain immoveable property and for the payment of money it was not open to the Court to recognise any uncertified adjustment under O. 21, R. 2, cl. 3, Civil Procedure Code. This was followed in *Sethurama Sahib* v. *Chotta Raja Sahib* (6) where Mr. Justice Sadasiva Aiyar who held in *Kelu Nair* v. *Meenakshi* (7) that O. 21, R. 2, of the Civil Procedure Code did not apply to the relief of possession of immoveable properties given by a decree, altered his view, and following the decision in *Abdul Latif Sahib* v. *Bathula Bibi Ammal* (5) held that where the decree provided for payment of money as well as other reliefs the adjustment of such a decree could not be recognised unless certified to the Court within the time allowed by law and observed that "the words 'the decree' in the second sentence of that rule meant a decree of any kind under which money is payable including a complex decree under which possession is also marked, and that as regards execution of that portion also of the decree which relates to possession of immoveables an uncertain adjustment cannot be recognised."

From the position of R. 2 in the present Code and from the heading and the marginal note, the intention of the legislature can be clearly gathered. Though the headings and marginal notes should not be held to govern the clear text of a section, yet they can be taken as an indication of what the legislature meant. Under the Code of 1859, S. 206 was in

4. (1898) I L R 22 Mad 182: 8 M L J 175.
5. (1913) 15 M L T 338.
6. (1917) M W N 327.
7. (1912) 25 M L J 536.

the chapter relating to execution generally. In the Code of 1877 and in the Code of 1882, S. 258 was in the chapter relating to execution under the heading 'Mode of Execution' and in the present Code, O. 21, R. 2 relates to execution of decrees and orders and the heading over R. 1 is 'Payment under Decree'. If the contention of Mr. Srinivasagopalachari is correct, the legislature should have said in plain terms that the adjustment of any decree out of Court should not be recognised unless certified to the Court within the time allowed by law. That was the clear expression in the Code of 1859 and if the legislature intended to re-enact that provision it would have done so in very simple language. The addition of the words 'of any kind' after the word 'decree' in the second line of O. 21, R. 2 was intended to set at rest the difference of view between the Madras High Court and the Calcutta High Court and the conflicting views as regards the meaning of S. 258 of the Code of 1882. By the addition of the words 'of any kind,' it cannot be said that the legislature intended that the adjustment of any decree, whatever may be the relief claimed, should be certified to the Court. We are clearly of opinion that O. 21, R. 2 refers to a decree under which money is payable whether there are other reliefs or not and if no money is payable under a decree then R. 2 cannot be held to apply to such a decree. The words 'payable under a decree' do not mean any money which the party may, if he chooses, pay, but money which is recoverable by a party in execution against the party liable to pay it. In this case, as already observed the plaintiffs could not execute the decree against 1st and 4th defendants.

First plaintiff died before the date of the *razi* decree and plaintiffs 2 to 4 entered into the agreement evidenced by Ex. A. The recital in the document is :—

"As we have on this date got from you a note of bond executed in our favour for this sum of Rs. 7,000, stipulating interest at Rs. 0-6-0 per cent. per mensem, you yourself shall take the *karar* and all other properties and also you yourself shall take from the said properties the income including the old arrears and the new income."

A pro-note was executed on the same day by the 2nd defendant in favour of the plaintiffs which is Ex. B. A suit was filed in the Pudukkotta Court for the amount due under the pro-note and was realised by the plaintiffs. The arrangement evidenced by Exs. A and B is therefore an adjustment of the decree passed in plaintiff's favour, and such an adjustment could be pleaded as the decree does not come within the pur-

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view of R. 2 of O. 21. The learned Judge has correctly held that the decree was adjusted by the arrangement evidenced by Exs. A and B and the plaintiffs therefore could not ask for execution of the decree which had already been adjusted. It is not necessary to consider in this view whether Ex. E amounts to a release of the plaintiffs' right in the property in favour of the sons of the 2nd defendant.

In the result, the appeal fails and is dismissed with costs.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

Srilasri Vythilinga Desika Pandarasannadhi ... *Petitioner* (Supplemental 3rd respondent in Appeal No. 43 of 1921 on the file of the High Court)*

*v.*

Arumuga Thambiran and another... *Respondents (Appellants 1, 2 and 5 and 1st respondent in do. and plaintiffs 1, 2, 5 and petitioner in I. A. No. 614 of 1920 in O. S. No. 71 of 1918 in the Sub-Court, Kumbakonam).*

Vythilinga Desika Pandarasannadhi v Arumuga Thambiran.

*Civil Procedure Code, S. 109 (a)—Scheme suit—Prayer for removal of trustee and for framing scheme—Death of trustee—Abatement—Order of remand directing trial as regards framing scheme—If a final order—Leave to appeal.*

During the pendency of a suit under S. 92, Civil Procedure Code for removing a trustee and for framing a scheme, the trustee died and the Court below held that the whole suit had abated. On appeal the High Court held that in so far as the suit related to the framing of the scheme, there was no abatement and remanded the suit for trial. *Held,* it was not "a final order" within the meaning of S. 109 (*a*) and was not appealable. Case-law referred to.

Petition presented under Ss. 109 (*c*) and 110 and O. 45, Rr. 2, 3 and 8 of the Code of Civil Procedure praying that the High Court will be pleased to grant a certificate enabling the petitioner herein to appeal to His Majesty in Council against the judgment and decree of the High Court in Appeal No. 43† of 1921, preferred against the decree of the Court

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*C M P No 1057 of 1925. 3rd February. 1926.

†49 M L J 324.

Vythilinga Desika Pandara-Sannadhi v. Arumuga Thambiran.

of the Subordinate Judge of Kumbakonam in O.S. No. 71 of 1918.

*C. S. Venkatachari* for *T. Rangachariar*, *A. Sriranga-chariar* and *R. Gopalachari* for petitioner.

*S. Srinivasa Aiyangar*, *K. S. Jayarama Aiyar* and *V. N. Venkatavaradachari* for respondents.

The Court made the following

ORDER :—In this case the Subordinate Judge held that the suit abated on the ground of the death of the defendant; the suit being one for the removal of the defendant from his alleged trusteeship and for framing a scheme for the suit mutt. In appeal here it was held that so far as the removal of the alleged trustee was concerned the suit must abate on the death of that trustee, but in so far as the suit was for the framing of a scheme the suit did not abate and could be continued against the succeeding trustee. An application has now been made for leave to appeal to His Majesty in Council against the order of this Court and the question with which we are now concerned is whether this is a final order within the meaning of S. 109. The petitioner relies upon two cases, *Meghraj* v. *Bidyabati Koer* (1) and *Lachmi Narain Marwari* v. *Balmakund Marwari* (2). The first of these two cases is distinguished from the prior case reported in *Krishnachandra Ghosh* v. *Maharajah Ram Narain Sing Bahadur* (3) on the ground that in the latter case the decree of the Court did not finally terminate the trial between the parties but left it open to the plaintiff to enforce his rights, if any, in a fresh suit. This remark would apply equally well to the facts of the present case and therefore even if the decision in *Meghraj* v. *Bidyabati Koer* (1) is correct in law, it is not applicable to the case before us. The case reported in *Lachmi Narain Marwari* v. *Balmakund Marwari* (2) differentiates the Privy Council decision in *Radha Kishan* v. *The Collector of Jaunpur* (4), not so much on what is actually decided in the latter, but on an inference drawn from the Privy Council judgment as to what would have been the decision if the facts had been different. It must, however, be observed that both the cases relied on by the appellant appear to be opposed to the decision of the Privy Council the latest of which is *Ramchand Manjimal* v. *Goverdhandas Vishandas Ratanchand* (5). There it was held that an order

1. (1914) 21 C L J 279. 2. (1921) 6 Pat L J 116.
3. (1913) 18 C L J 124. 4. (1900) I L R 23 All 220 : 11 M L J 65 (P C).
5. (1920) I L R 47 Cal 918 : 39 M L J 27 (P C).

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is only final if it finally disposes of the rights of the parties. These decisions have been discussed and followed by the High Court of Allahabad and Lahore *Muntaz-ud-daula Mukarram Ali Khan of Pahasu* v. *James R. R. Skinner* (6) and *Sultan Singh* v. *Murli Dhar* (7). In the present case there has been no adjudication as to the rights of the parties. So far as the petitioner is concerned there has been no trial and no adjudication. The question as between him and the plaintiffs is as to whether a scheme should or should not be framed and on that point there has been no adjudication at all and consequently the order of remand cannot be deemed to be a final order. The contention urged before us is that under the decree of the Subordinate Judge the petitioner obtained some sort of right. *i. e.*, that that particular suit should not proceed, and that that right has been taken away by the order of this Court. This is true but the right has not been taken away finally; it has been merely suspended pending further proceedings, and consequently the order taking it away temporarily cannot be said to dispose finally of that right, there being no final order by this Court. The leave to appeal must therefore be refused on the ground that the order of this Court is not a final order with in the meaning of S. 109, Civil Procedure Code.

It is further contended that special leave should be given as it is a fit case for appeal but we must refuse the application. If the allegations in the plaint are correct it is certainly desirable that the matter should be enquired into and that a scheme should be framed; consequently there does not appear to be good reason for the grant of special leave. The petition is dismissed with costs.

T. S. V. *Leave to appeal refused.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Venkataswami Naidu ... *Appellant** (*5th respondent-5th defendant*)

*v.*

Venkatasubba Naidu and other ... *Respondents* (*Petitioner and Respondents 1 to 4 and 6 Plaintiff and defendants 1 to 4 and 6*).

Venkataswami Naidu v. Venkatasubba Naidu.

*Limitation Act, Art. 182 (4)—Date of amendment—Meaning of—If refers to Court's order directing amendment or date of actual alteration*

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*A A O No. 150 of 1924. 27th January, 1926.

6. (1924) I L R 47 All 335. 7. (1924) I L R 5 Lah 329 (F B).

Venkataswami Naidu v. Venkatasubba Naidu.

The words "date of amendment" in Art. 182 (4) of the Limitation Act refer to the date of the Court's order directing the amendment and not the date on which the decree is actually altered or corrected. *Nirit Lal Jha* v. *Kalanand Singh*, (1916) 36 I C 533 followed.

Appeal against the order dated 21st November, 1923 of the Court of the Subordinate Judge of Vellore in C. M. P. No. 536 of 1923 in O. S. No. 94 of 1915 (on the file of the Court of the Subordinate Judge of Chittoor).

*Rangaswami Aiyangar* for *K. R. Narayanaswami Aiyar* for appellant.

*L. Venkatanarasiah* for respondent.

The Court delivered the following

JUDGMENT:—The only question for determination is the meaning of the words "date of amendment" in Art. 182 (4) of the 1st Schedule to the Limitation Act. It is contended for the appellant that the 'date of amendment' must mean the date on which the decree is actually altered or corrected and not the date of the Court's order directing the amendment, and argument is advanced that an amendment does not bear the same relation to the order as a decree bears to the judgment and that therefore the provision in the Civil Procedure Code which says that the decree shall bear the date of the judgment is not applicable here. As a matter of fact, an order of amendment is itself a judgment and in accordance therewith, the original decree is altered and becomes a new and amended decree in accordance with the judgment pronounced. It seems therefore, clear that the date of the amended decree must be the same as that of the judgment. To hold otherwise would be to put in the hands of the ministerial officers of the Court the power to fix any date for the amendment of the decree quite regardless of the date on which the order was passed. The same view was taken in *Nirit Lal Jha* v. *Kalanand Singh* (1) and we see no reason to hold otherwise.

The appeal is accordingly dismissed with costs.

T. S. V. *Appeal dismissed.*

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1. (1916) 36 I C 533.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Municipal Council, Rajahmundry... *Petitioner* in all the petitions (defendant.)*

*v.*

Nidamarti Jaladurga Prasadarayudu and another ... *Respondents (Plaintiffs),*

Municipal Council, Rajahmundry *v.* Prasadarayuda.

*Madras District Municipalities Act (V of 1920), S. 80—Notification under—What to contain—Rate not specified—If valid.*

A Municipality published a notification purporting to be under S. 80 of the District Municipalities Act, as follows: "Profession tax will be levied at the maximum rates in Sch. IV of Act V of 1920." *Held,* it did not comply with the requirements of S. 80, as it ought to mention the exact rate at which the tax was going to be levied.

Petitions under S. 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the Principal District Munsif of Rajamundry in S. C. S. No. 398 of 1923, 721 of 1923, and 733 of 1923, respectively.

*V. Ramadoss* for appellants.

*C. Rama Rao* for respondents.

The Court delivered the following

JUDGMENT:—C. R. P. No. 375 of 1924:—This is an application to revise the order of the Principal District Munsif of Rajahmundry. The petitioner is the Municipal Council of Rajahmundry. The respondent was assessed to profession tax and he brought a suit for the recovery of the amount collected from him on the ground that the collection was illegal. The main contention in the case is whether the Municipal Council published a notification as required by S. 80 of the District Municipalities Act. Under that section when a Municipal Council shall have determined under the provisions of Ss. 78 and 79 to levy any tax or toll for the first time or at a new rate, the Chairman shall forthwith publish a notification in the District Gazette and by beat of drum specifying the rate at which the tax or toll shall be levied from a date to be specified in the notification. The notification published by the Municipal Council on the 16th October, 1920 was to the following effect:

"This (*i. e.* profession) tax will be levied at the maximum rates in Sch. IV of the District Municipalities Act (V of 1920)."

This notification does not comply with the requirements of S. 80. What the Municipal Council published amounted only that the profession tax will be levied at an increased rate. It

*C R P Nos. 375 to 377 of 1924. 4th February, 1926.

ought to mention in the notification the rate at which the profession tax was going to be levied. Instead of that the Council published a notification to the effect that it would collect at the maximum rates in Sch. IV. The reference to Sch. IV is not a sufficient compliance with the clear terms of S. 80; for that section says the rate at which the tax is to be levied should be mentioned. I think this is a serious defect in the notification published and it cannot be cured in any way. When the Municipal Council propose to levy a tax it must make the people understand at what rate it is going to collect the tax and should not simply say it is going to collect the tax as provided for by the District Municipalities Act in Sch. IV or anything of the kind. On this point the plaintiff was entitled to succeed and the District Munsif was right in holding that the Municipal Council could not collect the tax when the notification did not comply with the requirements of the Law. The Revision Petition is dismissed with costs.

Municipal Council Rajahmundry *v.* Prasadarayudu.

After delivering the judgment my attention is drawn to a judgment of Mr. Justice Jackson in *The Krishna Jute and Cotton Mills Co., Ltd., Ellore* v. *The Municipal Council Vizianagaram* (1) and I am glad to find that I am in agreement with him.

*C. R. P. Nos.* 376 *and* 377 *of* 1924. Same order as the above in the above two petitions but the respondent will have his costs only in C. R. P. No. 377 of 1924.

T. S. V. *Petitions dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Ramachandra Chetty ... *Petitioner** (*Accused*)

Ramachandra Chetty *In re.*

*Madras District Municipalities Act (V of 1920), Ss. 347, 146, 149 and 313 —Notice directing a person to do an act—Omission to comply in time—No steps taken to enforce act—Second notice issued—Validity of—Prosecution within three months of second notice but more than three months after first notice—If barred.*

A notice was issued on a person under Ss. 146, 149 and 313 of the Madras District Municipalities Act regarding a latrine, but negotiations went on between the parties. Ultimately the notice was not complied with nor was any step taken by the Municipality to enforce the same. A second notice was then issued and

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*Cr R C No. 707 of 1925
(Cr R P No. 580 of 1925) 25th February, 1926.

1. (1925) 49 M L J 542.

Rama-chandra Chetty *In re.*

as that too was not complied with, a prosecution was launched within three months after the second notice but more than three months after the first. *Held*, there was nothing in the Act to prohibit the issue of a second notice, when no action had been taken on the first, and the prosecution was not barred by time under S. 347.

*Ramanujachariar* v. *Kailasam Aiyar*, (1925) 49 M L J 386 dissented from Crl Rev Case No. 164 of 1925 followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the judgment of the Court of the Sub-divisional First Class Magistrate of Salem in Criminal Appeal No. 49 of 1925, preferred against the judgment of the Court of the Third Class Magistrate of Salem in C. C. No. 579 of 1925.

*V. L. Ethiraj* and *A. Rangaswami Aiyangar* for petitioner.

*The Public Prosecutor* (*J. C. Adam*) for the Crown.

The Court made the following

Waller, J.

ORDER :—*Waller, J.* :—The question raised in this case is whether the prosecution is barred by limitation under S. 347 of the Madras District Municipalities Act. A notice was served on petitioner under Ss. 146, 149 and 313 of the Act in June, 1924. On July 4th he put in a petition to the chairman asking him to inspect the latrine. In reply an endorsement was sent on August 11th, informing him that he would be prosecuted if he did not obey the notice in one week. At the same time the Chairman directed the Health Officer to report further. That Officer's report was unfavourable to petitioner. On 22nd October a fresh notice was sent to petitioner, which was served on November 6th. He failed to comply with it and a prosecution was launched. It was launched within 3 months after the second notice, but more than three months after the first. Mr. Ethiraj contends that the offence was committed on the expiry of the first notice and that the prosecution is barred by limitation. His contention is supported by a decision of Srinivasa Aiyangar, J., which is reported in *Ramanujachariar* v. *Kailasam Aiyar* (1). Jackson, J., in Cr. R. C. No. 164 of 1925, took a different view. The same point was raised before Madhavan Nair, J., and myself in Cr. R. C. No. 122 of 1925, but was not considered by us. We held that the prosecution was within time as the first notice had been kept in abeyance while the parties were negotiating. It is possible that, in this case also, petitioner's representation

1. (1925) 49 M L J 386.

Ramachandra Chetty *In re.*

Waller, J.

of July 4th might be regarded as an attempt at negotiation, but Mr. Adam does not press the point. The question, then, for consideration is whether there is anything in the Act that prohibits the issue of a second notice, when no action has, for some reason or other, been taken on the first. I can myself see nothing that does so. The offence consists in the failure to obey a requisition issued by the competent authority. If a particular requisition is not enforced, I can find nothing in the Act that prevents the chairman from issuing another. If a prosecution had been instituted on the first requisition and had failed or not been pressed, other considerations might come in, but that question does not arise here.

I agree in the view taken by Jackson, J., that where, as here, no steps have been taken to enforce the first requisition, a Chairman is entitled to make a second and to institute a prosecution for failure to comply with it. The Criminal Revision Case is therefore dismissed.

Devadoss, J.

*Devadoss, J.*:—I agree.

T. S. V. *Revision petition dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR JUSTICE WALLER.

Mudurupayalagadu *alias* Subbigadu and others ... *Petitioners** (*Accused* 2 to 10).

Subbigadu *In re.*

*Penal Code, S. 148—Conviction under—Some other member of the unlawful assembly armed with deadly weapon—Effect of.*

A person who is a member of an unlawful assembly is guilty under S. 148, Indian Penal Code, when he himself is not armed with a deadly weapon, but some other member of the assembly is so armed. S. 148 does not merely provide for a heavier punishment in certain cases, but deals with an aggravated form of rioting. The carrying of a deadly weapon is in order to show criminal force and where it cannot but be in prosecution of the common object, all the members of the unlawful assembly can be punished under S. 148 read with S. 149.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of Cuddapah Division in Cr. A. No. 21 of 1925 preferred against the judgment of the Court of the Sub-divisional First Class Magistrate of Jammalamadugu in C. C. No. 87 of 1924.

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*Cr R C No. 549 of 1925
(Cr R P No. 463 of 1925). 9th March, 1926.

Subbigadu In re.

V. L. Ethiraj and K. Chathukutti Nambiar for accused.

*The Public Prosecutor* on behalf of the Crown.

The Court made the following

Devadoss, J.

ORDER:—*Devadoss, J.*:—The question of law raised in this case is whether a person who is a member of an unlawful assembly is guilty under S. 148 of the Indian Penal Code when he himself is not armed with a deadly weapon but some other member of the assembly is so armed; in other words whether a person who is a member of an unlawful assembly can be punished under S. 148 read with S. 149. The contention of Mr. Ethiraj is that S. 148 does not create a separate or new offence; it provides only for a heavier punishment in the case of rioters armed with deadly weapons or with anything which used as a weapon of offence is likely to cause death. He relies strongly upon *Sabir* v. *Queen-Empress* (1). Though the head note of the case is in favour of Mr. Ethiraj's contention, yet the observations of the learned Judges do not go the length of head-note. What the learned Judges observe is:

"It is only the actual persons who are so armed who can be charged under that section (meaning S. 148). The only way in which one person can be made liable for the acts of another is under S. 149. There being no case under S. 148 we think that the conviction is wrong under the latter section and must be set aside."

*In re Choitano Ranto* (2) simply follows *Sabir* v. *Queen-Empress* (1). "Offence" is defined in S. 40, Indian Penal Code, as "denoting anything made punishable by this Code" and in certain cases punishable under any special or local law. S. 148 does not merely provide for a heavier punishment in certain cases but actully deals with an aggravated form of rioting. Force is not an essential ingredient of the offence of being a member of an unlawful assembly. If any member of an unlawful assembly uses force in prosecution of the common object then it becomes rioting under S. 146, which runs as follows:—

"Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

A person guilty of rioting if armed with a deadly weapon commits an offence under S. 148. A good deal of argument has been advanced by Mr. Ethiraj on the wording of S. 148. His contention is that, if it is an offence, the wording would

1. (1894) I L R 22 Cal 276. 2. (1915) 29 I C 78.

Subbigadu, *In re.*

Devadoss, J.

have been "whoever is guilty of the offence of being armed with deadly weapon shall be punished with imprisonment", etc. It is unnecessary that the words "is guilty of the offence" should be found in every section which defines an offence. Assault becomes hurt and is punishable under S. 323 if bodily pain is caused. If the hurt is grievous, it is punishable under S. 325 and if the grievous hurt is caused by a dangerous weapon it is punishable under S. 326. Similarly S. 148 provides for the punishment of a more serious offence than mere rioting. Mr. Ethiraj does not contend that if the weapon is used in prosecution of the common object of the assembly all of them would not be guilty by reason of S. 149, but says that if it is carried without being used, then only the person or persons carrying the deadly weapon are guilty under S. 148 and not others. An unlawful assembly is defined as an assembly of five or more persons whose common object is, by means of criminal force or show of criminal force, to obtain possession of any property or to compel any person to do what he is not legally bound to do, etc. In order to show criminal force it is necessary to carry arms and if a deadly weapon is carried, though the weapon is not used, that weapon is carried in furtherance of the common object, and it cannot therefore be said that the person who carries the weapon carries it only on his account. Where an act is committed by a person which is not an essential ingredient of the offence which is intended to be committed by a body of persons, no doubt the other persons composing the body would not be liable for the act of a single individual; he does it on his own account. But, where the carrying of a deadly weapon cannot but be in prosecution of the common object, it cannot be said that the other persons composing the unlawful assembly cannot be punished under S. 148 read with S. 149.

Reliance was placed upon *Arunachala Thevan* v. *Emperor* (3). In that case Ayling, J., held that S. 394 and not S. 397 will apply to the case of a robber who does not himself cause grievous hurt or use any deadly weapon. It is not an essential ingredient of dacoity that grievous hurt should be caused, nor is it an ingredient of the offence of dacoity that a deadly weapon should be used. Any person who causes grievous hurt or uses a deadly weapon is therefore punishable under S. 397 or S. 398. But if in order to the committing of dacoity a deadly weapon was necessary or grievous hurt

3. (1911) 22 M L J 186.

Subbigadu, *In re.*

Devadoss, J.

was caused, all the dacoits would be equally guilty under S. 397 or S. 398. It is not necessary to discuss therefore the decisions in *Emperor* v. *Ali Mirza* (4); *Emperor* v *Dulli* (5); and *Emperor* v. *Nageshwar* (6). Under S. 34 of the Indian Penal Code, when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The Privy Council has applied this section in the well-known Post Office murder case. Where an assembly is an unlawful assembly, S. 149 makes every one of the members of the assembly guilty of any offence which is committed in prosecution of the common object of the assembly. If a deadly weapon is carried without the knowledge of the other members of the assembly for the private ends of a particular individual, no doubt the other persons would not be guilty under S. 148. But where that fact is not made out, but it is shown that one or more of the members of the assembly carried a deadly weapon it cannot be said that the weapon was not carried in prosecution of the common object; and therefore all the members of the assembly are guilty under S. 148. The next contention is that the common object has not been made out. The common object has been clearly made out in the evidence and we do not think that the petitioners have in any way been prejudiced by the common object not being explicitly stated. Mr. Ethiraj pleads for a lenient sentence. The petitioners have already undergone two months' rigorous imprisonment and taking all the circumstances into consideration we think that the period of imprisonment undergone by the petitioners would be sufficient punishment in the case.

We therefore reduce the sentence to the period already undergone by the petitioners.

Waller, J.

*Waller, J.*:—I agree. The ruling relied on *Sabir* v. *Queen-Empress* (1) lays down no more than that only the person actually armed can be charged under S. 148, Indian Penal Code. What, however, the Judges appear to have overlooked was that the man they acquitted had, as a matter of fact, been charged under S. 148 read with S. 149, Indian Penal Code. Had they not done so, they would presumably not have acquitted him.

T. S V. *Petition dismissed, but sentence reduced.*

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1. (1894) I L R 22 C 276.
4. (1923) I L R 51 C 265.
5. (1924) I L R 47 A 59.
6. (1906) I L R 28 A 404.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Vellathusseri Chakkalakumpil Raman Menon ... ... *Appellant** (*Counter-Petitioner—Defendant*)

*v.*

Vellathusseri Chakkalakumpil Pangunni Menon ... *Respondent* (*Petitioner—Plaintiff*).

Raman Menon *v.* Pangunni Menon.

*Mesne profits—Amount fixed in the decree—Execution—Interest on mesne profits—If can be awarded.*

Where the decree passed in a suit has directed a certain fixed amount to be paid as mesne profits but does not say anything about interest, a Court executing the decree cannot award interest on the amount of mesne profits. It may be otherwise if the amount of mesne profits is not fixed by the decree but is left to be ascertained in execution proceedings. *Harmanoje Narain Singh* v. *Ramprosad Singh,* (1907) 6 C L J 462: and decision of Wallace, J. in A A A O No. 74 of 1924 followed; *Lalta Prasad* v. *Sri Ganeshji,* I L R 44 All 579 dissented from.

Appeal against the appellate decree of the District Court of South Malabar in A. S. No. 68 of 1923 presented against the order of the Court of the District Munsif of Ponnani in E. P. No. 1420 of 1922 in O. S. No. 475 of 1917.

*K. P. Krishna Menon* for appellant.

*K. P. Raman Menon* for respondent.

The Court delivered the following

JUDGMENT :—The question involved in this appeal is whether the judgment-debtor, who is the appellant before me, is bound to pay interest on the mesne profits decreed against him.

The decree, so far as it relates to mesne profits, runs as follows :—

"That he (defendant) do pay to plaintiff Rs. 375 for kannipattom of the year 1092 and *future mesne profits from 8th Dhanu 1092 at 638 paras of paddy and Rs. 338 a year ending with 7th Dhanu* until surrender, or until the expiration of three years from this date."

In the light of the decision in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) the learned District Judge decided that interest on mesne profits should be allowed unless expressly excluded and allowed it at the rate of two per ten.

I think that case is clearly distinguishable. There, the Trial Court did not fix the amount of mesne profits but directed

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*A A A O No. 4 of 1924. 15th January, 1926.

1. (1900) I L R 27 C 951: 10 M L J 356 (P C).

Raman Menon v. Pangunni Menon.

that it should be ascertained on enquiry at the time of the execution of the decree and it was held that a decree for mesne profits carried interest on such profits, having regard to the definition of the expression "mesne profits" in the Code. In the present case the amount of mesne profits which the decree-holder was to get under the decree has been already fixed by the Court and was not to be ascertained afterwards It cannot be said that the amount so fixed does not include interest. I do not, therefore, think that the ruling of the Privy Council or the definition of mesne profits relied upon can justify the award of interest.

What the decision in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) lays down and what it does not, has been well pointed out by Mukerjee and Holmwood, JJ. in *Harmanoje Narain Singh* v. *Ramprosad Singh* (2). Rerferring to this decision and to another decision of their own Court the learned Judges state :—

"They are, no doubt, authorities for the proposition that where a decree declares that the plaintiff is entitled to mesne profits and says nothing about interest, if the amount of mesne profits is left for determination by the Court of execution, the decree-holder is entitled to interest upon the mesne profits and to have such interest added to the mesne profits when they are ascertained But these cases do not lay down that, if the Court which ascertains the mesne profits has omitted to allow interest, it is open to the Court which executes the decree for mesne profits to allow interest in execution proceedings. It is an elementary principle that the Court which executes the decree must execute it as it stands. Besides, there is no rule which makes it obligatory upon the Court to allow interest on the mesne profits; it is a matter of judicial discretion, to be exercised according to the circumstances of the case. If, therefore, the Court which assessed mesne profits improperly exercised its discretion and disallowed interest on erroneous grounds. the remedy of the decree-holders was by way of an appeal. They cannot now claim interest when the decree for mesne profits is silent as to interest."

These observations cannot be brushed aside as mere *obiter dicta* as suggested by the learned vakil for the respondent. I respectfully agree with them. [*See* also *Narendra* v. *Byomkesh* (3)].

In A. A. A. O. No. 74 of 1924, in disallowing interest on mesne profits awarded by a decree which was in similar terms like the present one, Wallace, J., states the law thus:—

"I read the law to be that, when the Trial Court has not fixed a figure for mesne profits, but has left that to be determined in execution, the executing Court may record interest; but when it has fixed a figure for mesne profits, it is not open to the executing Court to record interest, because it cannot be said

1. (1900) I L R 27 C 951: 10 M L J 356 (P C).
2. (1907) 6 C L J 462.
3. (1919) 30 C L J 205.

Raman Menon *v.* Pangunni Menon.

that the mesne profits figure already fixed does not include interest. Interest on the mesne profits, is, therefore, disallowed."

On behalf of the respondent my attention has been drawn to a decision in *Lalta Prasad* v. *Sri Ganeshji* (4) in which, though the amount of mesne profits was fixed, the learned Judges following the Privy Council decision allowed interest; and in so doing, they also relied upon a prior decision of their own Court in *Narpat Singh* v. *Har Gayan* (5) which, like the case in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) related to the execution of a decree where the mesne profits had not been fixed by the trial Court. Apparently, the learned Judges do not observe the distinction pointed out in *Harmanoje Narain Singh* v. *Ramprosad Singh* (2) and also by Wallace, J., in A. A. A. O. No. 74 of 1924. The decision in *Lalta Prasad* v. *Sri Ganeshji* (4) ignores the principle that the Court which executes a decree must execute it as it stands, and also overlooks the fact that, when the trial Court fixed the amount of mesne profits, it must have done so with due regard to the definition of mesne profits and that there was nothing to show that the amount so fixed did not include interest. I am not inclined to follow that decision. The case in *Banwari Lal* v. *Mussammat Rama* (6) does not help the respondent as the facts do not show whether the trial Court had fixed the amount of mesne profits in that case.

I hold that, since the amount of mesne profits was fixed by the Trial Court, it was not open to the executing Court to award interest, because it cannot be said that the mesne profits already fixed do not include interest. The decree of the learned District Judge as regards interest on mesne profits is, therefore, set aside with costs here and in the Court below.

In the Memorandum of Objections filed by the respondent the question raised is as regards the price of paddy per *para*. It is contended that the Lower Court erred in fixing the price of paddy at annas 12 a *para* instead of Rs. 1-8-0 a *para*. This is purely a question of fact. There is ample evidence to support the concurrent conclusions of the Lower Courts on this point. The Memorandum of Objections is dismissed with costs.

T. S. V. *Appeal allowed : Memorandum of Objections dismissed.*

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1. (1900) I L R 27 C 951: 10 M L J 356 (P C).
2. (1907) 6 C L J 462.
4. (1922) I L R 44 A 579.
5. (1903) I L R 25 A 275.
6. (1912) 17 I C 915.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN AND MR. JUSTICE VENKATASUBBA RAO.

The Collector of Chingleput District, Saidapet ... *Appellant** *in both (Respondent)*

*v.*

Kadir Mohideen Sahib ... *Respondent in both (Claimant).*

Collector of Chingleput *v.* Kadir Mohideen Sahib.

*Land Acquisition Act, Ss. 25 (2) and (3), 9 and 23—Notification of acquisition defective—Omission to give 15 days' notice under S. 9—Failure to make a claim—Amount of compensation—Limits of—Basis of valuation—Land useful as building site or as brickfield—Modes of computation—Hypothetical profit—Claim if sustainable—Interest—From when awardable.*

Where the notification of the Government in respect of a proposed acquisition of land was defective in that it did not clearly define the property intended to be acquired and did not give the claimant the 15 days' notice as required by S. 9 of the Land Acquisition Act, it amounts to "sufficient cause" within the meaning of S. 25 (3) for the claimant's omitting to make a claim and he escapes the application of the stringent provisions of S. 25 (2).

In computing the value of land compulsorily acquired under the Act, it is a well-established rule that the correct principle to apply is to assess the market value of the land as put to its most lucrative use. Each and every element of value which the land possesses to its owner must be taken into consideration in so far as it increases the value to him. It is not the land alone but the land with all its potentialities that must be considered in assessing the value. But the owner is not entitled to any hypothetical profit which in certain events he is likely to make.

Basis of valuing lands capable of being used as a brickfield explained. Scope and object of the Land Acquisition (Mines) Act (XVIII of 1885) considered.

Under S. 28 of the Land Acquisition Act, interest can be awarded only from the date when the Collector takes possession of the land acquired and not from the date of the award.

Appeals against the award, dated 8th August, 1922, of the District Court of Chingleput in Compensation Reference Nos. 3 and 4 of 1916 on its file.

*The Government Pleader* for appellant.

*Nugent Grant* and *A. C. Sampath Aiyangar* for respondent.

The Court delivered the following

Krishnan, J.

JUDGMENTS:—*Krishnan, J.*:—I have had the advantage of reading the judgment of my learned brother and as I agree with him generally I shall deal with the case ony briefly.

The objection based on S. 25, cl. (2) of the Land Acquisition Act (I of 1894) is clearly untenable. Cl. (1) says that

*Appeal Nos. 58 and 59 of 1923. 22nd February, 1926.

Collector of Chingleput v. Kadir Mohideen Sahib.

Krishnan, J.

the claim to compensation has to be made " pursuant to the notice given under S. 9 " and this makes a proper notice a pre-requisite. Now, as shown by the District Judge and by my learned brother, such a notice was not given in this case, the notices all being defective in one way or another. The claimant's omission, therefore, to make a claim before the Deputy Collector was not " without sufficient reason " and he escapes the application of the stringent provision of cl. (2) to his case.

As regards the value of the land acquired, which is the most important item in the total valuation, it is conceded that the claimant is entitled to have his land valued with reference to the most profitable use it can be put to. The land is very suitable for a brickfield as shown by the evidence; in fact the Government is acquiring it for the very purpose of using it as a brickfield. It is also suitable as a building site as proved by witnesses like Mr. Namberumal Chetti, a well-known citizen and building contractor of this City. The claimant is, therefore, entitled to have his land valued in both ways and given the higher value, whichever it may be.

The claimant asked us to value his land in the first instance as a clay producing land for making bricks. We were taken through a body of evidence about the profits made by brick-makers in the neighbourhood and the learned counsel for the claimant, relying on the case of *Rugby Portland Cement Co.* v. *London and N. W. Ry.* (1), argued that in assessing compensation regard must be had to such profits. We cannot accede to this argument. The case cited is a peculiar one; there the arbitrator had to assess the market value of lime-stone which was quarried by the Cement Co. and used by it in making cement but which had no market and therefore no market value could be directly deduced. What the learned Judges held was that though there was no market for the limestone it still had a market value which had to be ascertained indirectly by estimating what value it had to the claimant company itself and that for this purpose the total profits of that company which included the price of the lime-stone as the company paid no price for it, should be kept in view. They make it clear, however, in their judgments that the profit of the company was not a proper measure of compensation at all but was only an indication as to what the proper compensation payable in that case was. The method adopted

1. (1908) 2 K B 606.

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was a purely hypothetical one for ascertaining the value of the limestone as no other methods were available. That case is not applicable to the present case as clay seems to have, according to the claimant's own evidence, a market and a market value but unfortunately for the claimant he has taken no trouble to give us the necessary details to enable us to calculate that value. The evidence of his 19th witness, who is the only witness who speaks to the market value, shows that a cart-load of clay of 20 c. ft. was worth 12 as. to Rs. 1-4-0 in 1914 in and near Madras. To deduce the value of the clay *in situ* one must know the cost of the labour required for mining the clay and the costs of carrying it to Madras or places near for sale; without such details the value of the clay itself cannot be ascertained. I agree with my learned brother that it is too late now to ask us to send the case back to take further evidence. No affidavit has been filed and no proper reasons have been given why such evidence was not given in the Lower Court.

The learned District Judge has attempted to value the land as a brick-field by taking the royalty that may be properly obtained from this land if leased out to a brick-maker. The valuation on the basis of royalty is as shown by my learned brother not altogether a proper method in this case as it only gives the compensation payable to the lessor where lease rights have been created and lessees have also to be compensated in addition. Here the claimant is the sole owner of one piece of the land acquired and the kudivaramdar of the other. No interest of brick-making lessees are involved. If, however, in the absence of other methods, a royalty basis is to be taken as was done in *Mohini Mohan v. Secretary of State for India in Council* (2), I agree that a 4 as. rate per 1,000 bricks is quite a fair rate, and that an acre may be expected to yield a royalty of Rs. 2,500 in all. The mistake that the learned Judge has made in taking that as a basis for compensation at Rs. 2,000 an acre is that he does not make a sufficient deduction for the length of time that will be required to realise the royalty from the whole of the land acquired. The evidence on claimant's side itself shows that it would take about 50 years to work the whole of the clay on the land, which is about 55 acres in extent; that means that it will take some 30 years at least to exhaust the clay on the land acquired. The proper compensation will thus be only the capitalised present value

2. (1921) 34 C L J 188.

of the clay or such a sum as would when invested say in 6 per cent bonds enable Rs. 2,500 a year to be drawn for 30 years and be exhausted by the end of that time. This is so as the taking of the clay will reduce the land to a pit 12 to 15 feet deep at the end of the period, of practically no value. That land may have a little value but it is comparatively small being less than Rs. 100 an acre. It may be that that value should be added to the total sum arrived at. Taking the royalty method of valuation then, the present total value of the 33 acres and odd will not exceed Rs. 35,000 or 40,000 when worked out mathematically; that is Rs. 1,000 to Rs. 1,250 an acre. Even if we add something to this amount to represent the excess value of the land to the owner over and above the royalty he may get, the price will not exceed Rs. 1,500 an acre. The value so calculated is smaller than the value one gets by treating the land as a building site.

In what I have stated above I have treated the valuation of a clay field as governed by the principle stated by Lord Atkinson in the case of *Eden v. North Eastern Railway Co.* (3) that the true measure of compensation is the price the minerals would fetch as and when won and raised less the costs of working the mine and winning and raising them. To the same effect is the ruling of this High Court in *Raghunatha Rao v. Secretary of State for India in Council* (4) where the case of compensation for a stone quarry had to be considered.

What S. 23 of the Act requires us to do is to ascertain in the case of land acquired, its market value and that is made the criterion even in the case of mines and minerals by the Land Acquisition Mines Act (XVIII of 1885), S. 6. Market value has been defined in various cases as the price a willing purchaser is prepared to pay to a willing seller for the property in the open market. No purchaser will pay the calculated full value of the minerals existing in a mine when buying a mine for he would get no profits out of his purchase as every purchaser expects to make. It is therefore contended that the full value of minerals in a mine should not be calculated and treated as the market value of the mine itself but only that value less a reasonable percentage deduction to represent the buyer's profit. There is force in this argument in my opinion but it is not necessary to decide it in this case as even without such a deduction the compensation

3. (1907) A C 400.
4. (1919) I L R 44 M 264: 39 M L J 623.

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does not work out at a higher figure than if the land were valued as a building site.

Taking next the value of this land as a building site it must be remembered that it is not very far from Madras and people will have houses to live in in places quite adjacent. The various sales in the neighbourhood have all been referred to by my learned brother and I need not therefore again refer to them. Some of them are useless for ascertaining the value of the land as the properties sold included houses whose values have not been proved. The rates at which sales took place seem to vary very greatly. Nevertheless from these sales and the oral evidence we have to fix the market value. Taking the evidence as a whole and making all due allowances I agree with my learned brother that if we allow a sum of Rs. 2,000 an acre (of 18 grounds) the valuation will be fair. It is true the claimant purchased the whole plot of 55 acres and odd for Rs. 50,000 about two years before this acquisition. But this transaction was one between near relations and not an ordinary sale in the market. Half the price had already been allotted as a gift to the claimant and it is evident from the circumstances of this sale that the claimant got the property at a very favourable rate. The price he paid cannot therefore well be treated as the basis of market value. It is not always possible to assess with mathematical accuracy the market value of any property; a certain amount of margin will always exist. On the whole the value of Rs. 2,000 an acre is a fair and proper one in my opinion.

As regards the other headings of valuation I agree with the award as made by my learned brother.

Evidently the values given for the buildings and for the trees are quite inadequate. The evidence shows that the central building was a fairly large one; after the acquisition it was not looked after and fell into ruins. At the time of the acquisition it was in quite a repairable condition and Mr. Namberumal Chetti says that by spending Rs. 4,000 it would have been put in thorough repair and the building would have been worth Rs. 10,000. Mr. Sourinathan, the Government Engineer, has only valued the building as debris and not as a standing structure at all. I agree Rs. 4,000 is a fair value to give for all the buildings. The trees should be valued not as mere firewood but as standing trees yielding fruit; except those like *Korakkappali* which is only useful as

firewood. I think the amount fixed by my learned brother Rs. 4,800 for all the trees is quite proper.

The total award of this Court in favour of the respondent thus comes to Rs. 6,111-8-0 over and above the award of the District Judge in his favour. The fact that he is only the *kudivaramdar* in one of the plots acquired does not really make any difference in this case as the *melwaramdar* has accepted what was awarded to him and has not appealed. The increase we have granted is in the interest that belongs to the *kudivaramdar*.

I would therefore dismiss the Appeals Nos. 58 and 59 with costs of the respondent and allow the memorandum of objections in part and modify the award of the Lower Court as proposed by my learned brother. In the memorandum I would direct the parties to bear costs.

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*:—The Government have filed Appeals Nos. 58 and 59 of 1923 from the award under the Land Acquisition Act of the District Judge of Chingleput and the claimant Kadir Mohideen Sahib has filed Memorandum of Objections in both these appeals. The Deputy Collector who in the first instance enquired into the value of the property under S. 11 of the Act made an award granting as compensation, Rs. 6,677-13-8. The claimant was dissatisfied and on his application a reference was made under S. 18 to the District Judge of Chingleput who by his award has increased the compensation to Rs. 81,609-12-0. The Government in their appeals urge that the amount awarded by the District Judge is too high, whereas the claimant in his Memorandum of Objections contends that he is entitled to more.

The claimant did not appear before the Deputy Collector who proceeded with the enquiry *ex parte* and a preliminary objection based upon this fact was taken on behalf of the Government before the District Court. That objection was disallowed and was again raised before us. S. 25 (2) says that when the applicant has omitted without sufficient reason to make a claim to compensation the amount awarded by the Court shall not exceed the amount awarded by the Collector. Under S. 25 (3) however the omission to apply will not operate as a bar if the Judge finds that it is due to a sufficient reason. Under the section the sufficiency is to be found by the Judge and the question we have to decide is, whether there are grounds for our interfering with the Judge's discretion.

The original notification in respect of the intended acquisition was published in 1914 (Ex. 2). The Government

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then proposed to acquire 52.19 acres. The claimant was unwilling to part with his property and this led to some correspondence between him and the Government. Nothing definite happened till October, 1915 when the Government published another notification (Ex. 3) stating that they withdrew from the acquisition of a part of the property, namely, 15.94 acres. This notification was dated the 19th October, 1915 and was published in the Gazette issued on the 26th October. Defective as the notices issued between Exs. 2 and 3 are, as the District Judge observes, we are really concerned with Ex. 3 and notices issued in pursuance thereof. The District Judge has held that the notification and notices did not clearly define the property and that it was not capable of identification and his view appears to be correct. Ex. 2 describes the property originally intended to be acquired and Ex. 3 the property withdrawn from the acquisition. From a perusal of these two documents with the aid of the map that appears to have been available, it is impossible to locate the exact portion which the Government ultimately intended to acquire and no particulars were furnished to the applicant although he applied for them. (*See* Ex. 4-M, dated the 30th October, 1915.) At the time of the Deputy Collector's enquiry all that was known therefore was the extent of the land that was to be acquired but it was not possible to locate the portion and no facilities were given to the claimant for identifying the land. The District Judge has rightly held that this constitutes a sufficient reason under S. 25 (3).

There is still another ground. The notice given to the claimant subsequent to Ex. 3 is Ex. C. This was apparently intended to be a notice under S. 9. This notice purports to have been issued in October and bears no date. Ex. C contains the revised extent and it may therefore be presumed to have been issued only subsequent to Ex. 3 which is dated the 19th October. S. 9 requires that the claimant shall be given at least 15 days' notice. Ex. C (granting that it was issued on the 19th), which calls on him to appear on the 30th October, is therefore clearly defective. The Government have not shown when that notice was issued but the most favourable assumption from their point of view, namely, that it was issued on the 19th of October, does not help their case. The claimant cannot be said to have committed default in having failed to appear in compliance with this notice. I agree with the District Judge that this is again a sufficient cause under S. 25 (3).

The enquiry was apparently adjourned from the 30th October to the 23rd November and on the day previous to that fixed for the hearing, the claimant sent Ex. 4-P (dated the 22nd November, 1915) to the Deputy Collector requesting him to grant an adjournment. This request was not heeded and on the 23rd, the Deputy Collector proceeded with his enquiry and made his award. The claimant might have with impunity quite ignored the notices in view of the defects to which I have adverted. But his request for the adjournment, in the circumstances, was reasonable and the Deputy Collector ought not to have proceeded with the enquiry *ex parte*. I am clearly satisfied that the District Judge has soundly exercised his discretion and I see no reason to interfere with his decision on this point.

Having disposed of the preliminary objection, I shall now proceed to consider the merits of the case. The property acquired consists of two contiguous plots of land in the ryotwari village of *Arambakkam* and the zemindari village of *Chinnakudal,* including certain buildings, trees and wells on the land. The land in Arambakkam village measures 19.51 acres, and that in the Chinnakudal village 13.55 acres, thus making a total of 33.06 acres. These two parcels form one block and for purposes of valuation the appeals have been argued on the footing that they have to be treated alike. The lands are situated on the Poonamallee High Road, a part of which lies within Madras and the rest outside its limits and are 4 miles 2 furlongs distant from the Fort St. George or a mile beyond the Madras Municipal Toll Gate. The lands abut on the High Road with a frontage of a furlong. They are bounded on the north by the Cooum River, the southern boundary being the Poonamallee High Road itself. If the land in question had not been severed from another bit belonging to the claimant, the Cooum would then have been also the western boundary as the river takes a bend at that place. But as it is, between the Cooum on the west and the claimant's land, there intervenes this strip that has not been acquired. On the east, there is a brick-field belonging to Mr. Saminatha Pillai, claimant's 10th witness. It is shown in the map as Plot No. 16.

The first question that arises is, whether the value is to be assessed on the footing that the land is agricultural or that it is fit for building purposes or thirdly that it is land producing clay useful for making bricks. It is a well-established rule that the correct principle to apply is to assess the market value

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of the land as put to its most lucrative use. See *Thareesamma* v. *The Deputy Collector of Cochin* (5). The learned District Judge has held that as building site the land would be worth Rs. 1,500 an acre, but as clay producing land Rs. 2,000 would be a fair price. As in his opinion the most advantageous way of enjoying the land is to use it as a brick-field, he has awarded compensation at the higher rate. The learned District Judge has summarily rejected the theory and very rightly that the land is to be treated as agricultural land. I shall proceed to consider the two uses to which this land can be put, first as building site and then as a brick-field.

I shall first consider what the fair market value is, the land being regarded as fit for building sites. The learned District Judge rightly attaches much value to the evidence afforded by the documents. Regarding oral evidence, it may be said that it does not support the absurd contention of the Government that the land is to be valued at Rs. 100 an acre.

[His Lordship then discusses the evidence.]

We may fairly allow him compensation for the land acquired at the rate of Rs. 2,000 per acre.

I shall now proceed to consider the question as to the compensation the claimant will be entitled to if the land be regarded as a brick-field. The evidence clearly establishes that the clay on the land in question is superior to that obtainable elsewhere in the locality and that the land itself as a brick-field enjoys greater facilities than any other plot in the neighbourhood.

[His Lordship then discusses the evidence.]

Let us now turn to the methods of valuation suggested by the claimant. It has been urged on his behalf that he is entitled to compensation on the basis of the profit which he is likely to make by converting clay on his land into bricks and selling bricks in the open market; in other words, we have been asked to award him an amount that will represent his profit in the event of his establishing a brick factory and carrying on business on a large scale in bricks. This contention seems to be unsound. It is undoubtedly true that in awarding compensation, any and every element of value which the lands possess to the owner must be taken into consideration in so far as it increases the value to him. [*Lucas and*

5. (1923) 45 M L J 339.

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*Chesterfield Gas and Water Board, In re* (6)]. In other words, not the land alone but the land with all its potentialities must be considered in assessing the value. In *Commissioners of Inland Revenue* v. *Glasgow and South-western Ry. Co.* (7) there is no authority however for holding that the claimant is entitled, in such circumstances as exist in the present case, to the hypothetical profit which in certain events, he is likely to make. The claimant has not made out—indeed he has not even attempted this—that he cannot acquire for a proper price another brick-field enjoying similar advantages if he really wishes to manufacture and sell bricks. It is open to him if he is so minded to purchase clay land and establish a brick manufactory and there is nothing to prevent him from investing his money in such a concern and making such profit as he can. In these circumstances it is impossible to accede to his contention that he must be awarded compensation on the basis of loss of possible profit. How excessive the claim is on this footing is shown, by the fact that making a calculation on the basis of figures given by Mr. Pattabhirama Rao, the claimant can realise a profit of 7 1|2 lakhs of rupees although the amount may be spread over 72 years. The amount which he has really claimed falls far short of this, as he himself shrinks from claiming the full amount to which he may become entitled if his theory is sound. The claimant next suggests that a method of valuation may be adopted based on the price of the total quantity of clay obtainable from the land. This seems to be the right principle and if the necessary facts are before us the law can be easily applied. The rule applicable to cases of this kind is clearly laid down in *Eden* v. *North-western Railway Co.* (3). This case was decided with reference to the Railways Clauses Consolidation Act, 1845, on which is modelled the Indian Act, the Land Acquisition (Mines) Act (XVIII of 1885). The object of the latter Act was to make provision for the grant of compensation to the owners of mines and minerals situated under the land sought to be acquired by the Government. The Act enables the Government to exclude from the acquisition the minerals lying under the land and if the minerals are intended to be excluded, the Government when making a declaration under S. 6 of the Land Acquisition Act, has to insert a statement that the minerals are not needed. The owner of the minerals

3. (1907) A C 400.

6. (1909) 1 K B 16 at 29. 7. (1887) L R 12 A C 315 at 321.

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if desirous of working them has then to give notice to the Government of his intention to do so. After receipt of that notice, if it appears to the Government that the working of the minerals is detrimental to its interests, it may stop the working and is in that event bound to pay compensation to the owner for the loss which he sustains. Under the Land Acquisition Act the Government may acquire the land which includes mines and minerals and it is then bound to pay compensation for the entire land. Under the Land Acquisition (Mines) Act the Government may acquire the land excluding the mines and minerals if it subsequently find that the working of the minerals should be prohibited, it is empowered to stop the working, paying to the owner the compensation for the loss, the method of ascertaining the amounts payable under both the Acts is the same. (*See* S. 6 of Act XVIII of 1885). The Mines Act is to be read as part and parcel of the Land Acquisition Act. (*See* S. 17 of Act XVIII of 1885). There is no doubt therefore that the law that is to be applied is to be found in the case already cited, *Eden* v. *North-western Railway Co.* (3). As Lord Atkinson in his judgment says, "the true measure of compensation is the price the minerals would fetch as and when won and raised less the cost of working the mine winning and raising them." In that case the proprietor's rights were split up between the lessor and the lessee. If the coal had been worked, the lessee would be in due course have made, after deducting the royalty and cost, £730, and the lessor would have received £155. Lord Atkinson observes :—

"Taking the test I have mentioned the value of the coal *in situ* therefore was this £730 *plus* the royalty, that is, £855 (a slip for £885) in all and I think that value the Company must pay."

Again the learned Lord observes :—

"It would seem to me that a fair way of dividing the value of the coal *in situ* between the lessor and the lessee is to give the lessor the royalty he would have been entitled to had this coal been won and raised and sold and to the lessee who was entitled to win and raise them, the balance of this sum of £855 (again a slip for £885), namely, £730."

No question of the splitting up of rights arises in this case and therefore if we can determine what the value on the spot of the total quantity of the clay is, the claimant will undoubtedly be entitled to that value. But the evidence is unfortunately extremely deficient on this point. The only witness

3. (1907) A C 400.

who speaks to the price of clay is Mr. Aiyaswami, the 19th witness for the claimant. He says :—

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"For a cart load of clay one has to pay Re. 1 to Re. 1-8-0 per cart load of 20 c. ft. In 1914 a cart load of clay would have cost As. 12 to Re. 1-4-0 in and near Madras."

This witness has not been asked what it would cost to remove one cart load of clay from the earth; nor has he been asked what the price of the clay at the site is. He says that it would cost As. 12 to Re. 1-4-0 in and near Madras. It has not been elicited from the witness as to how much has to be deducted for cartage to carry the clay from the claimant's land to Madras. The cost of labour for removing the clay from the soil is the most important item and as I have said the witness gives us no information about it. It is true that he has not been asked any questions in cross-examination with reference to this matter, but it is the duty of the claimant to furnish the data for assessing the value. Unfortunately he has failed to do so and we cannot therefore find the facts to which the law as stated above can be applied.

The learned District Judge has attempted to arrive at the value of the land on a royalty basis. Swaminatha Pillai pays four annas for thousand bricks for the neighbouring land on which he manufactures bricks. There is some conflict of evidence regarding the rate of royalty but the learned District Judge has taken four annas as representing a fair rent. Having regard to the fact that the claimant's land is superior to that of Swaminatha Pillai, it may be assumed that it would fetch a higher rate of royalty. The learned District Judge's method of valuation is as follows : On the evidence he comes to the conclusion that an acre of land yields about 100 lakhs of bricks and the royalty in respect of them at four annas per thousand would be Rs. 2,500. An acre of land, he thus argues, would be worth Rs. 2,500. Making allowance for the fact that to realise the full value of bricks in respect of the entire 33 acres will take a long time, the District Judge in the end assesses the value of an acre at Rs. 2,000.

I think he is quite justified on the evidence in estimating 100 lakhs of bricks to an acre. Mr. Pattabhirama Rao says that to work 3 acres to a depth of 10 feet took him three years. The calculation of the District Judge is made on the footing that the clay can be worked to a depth of 15 feet. At that rate it will take about 72 years to complete the 33 acres. On the District Judge's figures his conclusion is somewhat wrong.

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An investment of about Rs. 42,000 in 6 per cent. bonds will fetch an annual income of Rs. 2,500. It must be remembered that it is unnecessary to make an investment of such a large sum, for the whole of the capital must get exhausted by the end of the stated period, whether it is 72 years or whatever else that may be. On the District Judge's calculation he has given Rs. 2,000 x 33 or Rs. 66,000 odd. A sum considerably less even than Rs. 42,000 would be sufficient to enable the claimant to draw annually for a stated period Rs. 2,500. Even if the royalty be taken at 5 or 6 annas per one thousand bricks the amount to be invested would be considerably less than Rs. 66,000 odd which the District Judge has given. I have gone into this matter a little closely for the purpose of showing that on the royalty basis, the valuation given by the District Judge at Rs. 2,000 per acre is wrong; but in any event that is not the correct principle to adopt and the claimant whose interest is not split up into that of lessor and lessee is entitled to more than the value to be assessed on the basis of royalty. In the words of Lord Atkinson already cited, the method adopted by the District Judge gives the claimant that amount to which the lessor would have been entitled had the land in question been leased and there were two interests carved out, the interest of the lessor and the interest of the lessee. The conclusion to which I have come is that on the material before us it is impossible to assess the land on the basis that it is a brick field.

The learned Counsel for the claimant has asked us to send the case back to the Lower Court for the purpose of enabling his client to give the necessary evidence. This request it seems to us, cannot be acceded to. It is not explained why the claimant failed to place the necessary materials before the Lower Court and his excuse, so far as we can see, appears to be, that he was not then aware of the law on the subject. The claimant cannot complain of want of time as the land acquisition proceedings commenced in 1914 and the District Judge delivered judgment in 1922. It was a feeble request that was made to us to send the case back, a request not based on any affidavit, and in the circumstances we are constrained to dispose of the case on the materials that are before us.

I have already said that as building land the claimant will be entitled to Rs. 2,000 per acre. The District Judge has also come to the conclusion that it is the proper value though no doubt for different reasons. In our opinion this

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is the value that the claimant is entitled to. This disposes of the most important item of the claim.

[His Lordship then discusses the amount of compensation payable for buildings, trees, etc.]

The learned Government Pleader urges that interest ought not to have been awarded from the date of the award but that under S. 28 only from the date on which the Collector took possession of the land acquired. The date of the award is 15th December, 1925. Possession was taken on 14th February, 1916. The Government's contention on this point is correct and the interest must be decreed only from the date possession was taken.

The award of the District Judge will be confirmed subject to the modification to which I have referred.

Making the modifications the amount awarded is as follows:—

| | | Rs. | A. | P. |
|---|---|---|---|---|
| Excess in respect of buildings | ... | 2,220 | 0 | 0 |
| Excess in respect of trees | ... | 2,300 | 0 | 0 |
| Amount allowed for ponds | ... | 760 | 0 | 0 |
| Amount wrongly deducted by the District Judge for ponds | | 125 | 0 | 0 |
| Total | ... | 5,405 | 0 | 0 |
| 15 per cent. on the above | ... | 810 | 12 | 0 |
| Total | ... | 6.215 | 12 | 0 |
| Amount awarded by the District Judge | ... | 81,609 | 12 | 0 |
| Total | ... | 87,825 | 8 | 0 |

From this must be deducted Rs. 104-4-0 the compensation paid to the *melvaramdar* and 15 per cent. thereon.

The claimant will be entitled to Rs. 87,721-4-0 with interest on Rs. 81,043-6-4 (Rs. 87,721-4-0 *less* Rs. 6,677-13-8 being the amount awarded by the Deputy Collector) at 6 per cent. per annum from the 14th February, 1916.

I agree with the order of my learned brother as to costs.

T. S. V. *Appeals dismissed; Memorandum of Objections allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Chinnappa Tharakan (Purchaser) ... *Appellant** (*2nd respondent*)

*v.*

Kanoor Puthen Veettil Ittichi Amma and others ... *Respondents* (*Petitioners and 1st respondent*).

Chinnappa Tharakan *v.* Ittichi Amma.

*Civil Procedure Code, O. 21, R. 89—Mortgage decree—Karnavans and anandravans—Decree directing sale of certain items for a portion of decree amount—Non-liability of tarwad properties for the balance—Sale of all properties—Application to set aside sale of tarwad properties—Amount to be deposited—"Amount specified in the proclamation of sale"—Construction of.*

A mortgage decree was passed against the karnavan and anandravans of a Malabar tarwad, but as a portion of the mortgage debt alone was found binding on the tarwad, the decree contained a direction that items 1 to 21 which were tarwad properties would be liable to the extent of the debt found binding on the tarwad, while for the balance of the decree the karnavan's private properties, items 22 to 29, were made liable. The preamble of the sale proclamation mentioned the full decree amount, but the remarks column specifically mentioned that items 1 to 21 were being sold for only a part of the decree amount. After the sale, the anandravans deposited in Court the amount for which items 1 to 21 had been directed to be sold together with the 5 per cent. for the purchaser and applied under O. 21, R. 89 to have the sale of those items set aside. The auction purchaser opposed the application on the ground that the sale could be set aside only on depositing the whole decree amount. *Held,* the anandravans were entitled to set aside the sale of items 1 to 21 on depositing the amount for which those items had been directed to be sold.

The words "amount specified in the sale proclamation" can only mean the amount which is to be realised by the sale of the particular properties.

Appeal against the order of the Court of the Subordinate Judge of Ottapalam in M. P. No. 1413 of 1923 in O. S. No. 17 of 1920 (E. P. No. 364 of 1922).

*T. R. Ramachandra Aiyar* and *A. Vasudeva Menon* for appellant.

*K. P. M. Menon* and *P. Govinda Menon* for respondents.

The Court delivered the following

JUDGMENT :—A mortgage decree was passed in O. S. No. 17 of 1920 against the karnavan, anandravans and other members of a Malabar tarwad. It was found that only a portion of the mortgage amount was binding on the tarwad

*A A O No. 24 of 1924. 3rd February, 1926.

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and the rest was payable by the karnavan alone. A direction was given in the judgment in the following terms :—

"In case of sale items 1 to 21 will be liable only to the extent of Rs. 3,309-9-2 and three-eighths of the subsequent interest and costs and the balance of the decree amount will be realised from items 22 to 29."

In the decree it was worded as follows :—

"If such payment is not made on or before the said 14th day of December, 1921, items 1 to 21 of the mortgaged property described below be sold for the realisation of Rs. 3,855-11-3 and subsequent interest thereon."

Items 1 to 21 were brought to sale and were purchased by the appellant. The anandravans deposited Rs. 5,300 in Court and applied under O. 21, R. 89 to have the same set aside. The Subordinate Judge held that the amount paid covered more than the amount charged on the items and set aside the sale. The auction purchaser has appealed against his order.

The contention of Mr. Ramachandra Aiyar for the appellant is that the decree was for Rs. 11,000 odd and the whole amount of the decree should be paid before the sale could be set aside under O. 21, R. 89. From the judgment and decree it is clear that the liability of the tarwad was only to the extent of Rs. 3,309-9-2 and subsequent interest and costs. The argument of the appellant is that in the proclamation of sale the amount of Rs. 11,000 odd was mentioned and therefore that should be taken as the amount of the decree for the satisfaction of which the property was sold. In the preamble of the proclamation the amount of Rs. 11,000 odd was mentioned, but in the remarks column it was specifically mentioned that items 1 to 21 should be sold for the amount of Rs. 3,885-11-3 and interest as directed by the decree. When there is a specific mention in the proclamation of sale that a certain amount only is realisable from the sale of certain items, it cannot be reasonably contended that in order to redeem them the whole of the decree amount should be paid. Supposing in this case the respondents paid the amount mentioned in the remarks column before the sale could the mortgage decree-holder have insisted upon their sale for the satisfaction of his decree. The burden on items 1 to 21 was specifically mentioned in the proclamation of sale and any one interested in redeeming the items could not be asked to pay anything more than the amount of the burden imposed upon them. The wording of cl. (*b*) of R. 89 (1) of O. 21 is :—

"The amount specified in the proclamation of sale as that for the recovery of which the sale was ordered."

Chinnappa Tharakan v. Ittichi Amma.

This expression could only mean the amount mentioned in the proclamation of sale as that which is to be realised by the sale of the property. The amount mentioned in the preamble cannot be held to control the clear statement in the remarks column that items 1 to 21 should be sold only for so much.

The Subordinate Judge treated the decree as two decrees one against the tarwad and the other against the karnavan personally. Though the mortgage decree was one, the relief was against two sets of persons, one the tarwad as represented by the anandravans and others, and the other the karnavan in his individual capacity. When a decree is passed against two different persons separately, each person is only liable to the extent of the decree against him and if his property is sold to satisfy the decree he can have the sale set aside by paying the amount due from him alone. In this case, the liability of the tarwad was only to the extent charged on items 1 to 21, and the tarwad was entitled to redeem the propery on payment of the amount before sale, and after sale it cannot be said that it was not entitled to have it set aside on payment of the amount charged on it together with 5 per cent. of the purchase money. The contention of the appellant, if pushed to its logical conclusion, would mean that the mortgagee decree-holder was entitled to sell the properties for the full amount of his decree. This is against the clear terms of the decree and the specific direction in the proclamation of the sale.

Mr. Ramachandra Aiyar relies upon *Karunakara* v. *Krishna* (1) and contends that R. 89 ought to receive a strict interpretation and that the amount specified in the proclamation should be taken as Rs. 11,000 odd. That case does not help the appellant. The facts were : A certain amount was paid into Court by one of the defendants. Another defendant whose property was sold applied to have the sale set aside under R. 89 without paying the full amount. He contended that the amount paid by another judgment-debtor which was in Court should be added to the amount paid by him. The learned Judges held that that could not be done. Under R. 89 credit could be given to the defendant for any money received by the decree-holder. So long as the decree-holder had not received any portion of the decree amount the defendant is not entitled to be given credit for any amount which may be in Court in order to make up the amount payable under the

1. (1915) I L R 39 M 429: 28 M L J 262.

Chinnappa Tharakan *v.* Ittichi Amma.

decree when he applies for setting aside the sale under R. 89. If the amount was paid by him to the credit of the decree-holder that would be different, but where a portion of the decree amount was paid into Court by another judgment-debtor and when that amount was not received by the decree-holder, a person who pays an amount less than the decree amount is not entitled to have credit for the amount in Court so as to make up the deficit. Reliance is also placed upon *Subramania Pillai* v. *Corera* (2). In that case the decree directed the sale of items in the first schedule to a limit of Rs. 20,000 and the sale of items in the second schedule up to a limit of Rs. 10,000. A sum of Rs. 10,000 was paid into Court, and one of the defendants wanted the amount to be allocated between the two sums of Rs. 20,000 and Rs. 10,000 recoverable by sale of two different sets of properties.. The learned Judges (Ramesam and Jackson, JJ.) held that that could not be done. When certain properties are made liable for a certain amount, a decree-holder is entitled to have the decree executed against them to the extent of the amount recoverable by their sale, and a judgment-debtor is not entitled to have any amount paid into Court by another to be allocated towards the different sums charged on different properties. If the mortgagor is the only defendant in the case, there would be no difficulty, for, his property could only be sold for the amount due to the mortgagee after deducting the amount paid by him, but where different persons have interest in different items and when the decree directs that certain items are liable to a certain extent, the persons interested in those items are not entitled to insist that any amount paid by the mortgagor should go towards reducing the amount charged on the items belonging to them or in which they have an interest. That case also has no application to the present case. We are clearly of opinion that in this case the proclamation of sale specified the amount due on items 1 to 21 as that for the recovery of which their sale was ordered, and the respondents therefore were not bound to pay the whole of the decree amount but only that for which the items were sold together with 5 per cent. in order to get the sale set aside under R. 89, of O. 21. The judgment of the Subordinate Judge is right, and we dismiss the appeal with costs.

T. S. V. *Appeal dismissed.*

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2. (1924) 48 M L J 121.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Tambireddi Virareddi ... *Appellant** (*2nd Counter-petitioner Surety*)

*v.*

Devi Reddy Pattabhirami Reddy and Company, represented by Cherukumudi Subbaramiah, and others. .. *Respondents* (*Petitioners and 1st Counter-petitioner.*).

Virareddy *v.* Devi Reddy Pattabhirami Reddy and Company.

*Surety for judgment-debtor—Satisfaction of decree by uncertified payment or adjustment—Plea of, if can be put forward by him—Civil Procedure Code, O. 21, R. 2—Surety for judgment-debtor if can apply under—Decree executed against surety on default.*

A person, who stands surety for a judgment-debtor, and who executes a security bond undertaking to produce and hand over the judgment-debtor whenever called upon by the Court to do so, and making himself, in default of his so doing, personally liable for the amount of the decree, cannot plead satisfaction of the decree by any adjustment or discharge of the decree which has not been certified by the Court as required by O. 21, R. 2, Civil Procedure Code. The surety is bound so long as the judgment-debtor is bound, and the judgment-debtor is bound so long as any payments which he may have made are not certified by the Court.

A surety for a judgment-debtor has no *locus standi* to insist upon an inquiry under O. 21, R. 2 as to whether the decree has been satisfied, but he can apply to the Court to hold an enquiry as to that matter.

No fresh decree is passed against the surety on his failure to carry out his undertaking. The decree that is executed against him in such a case is the decree in the suit.

Appeal against the order of the District Court of Nellore, dated 26th January, 1925 in E. P. No. 44 of 1924 in O. S. No. 2 of 1923.

*B. Somayya* for appellant.

*T. V. Venkatarama Aiyar* and *T. V. Ramanatha Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The plaintiffs who are respondents 1 and 2 herein arrested the 2nd defendant, the 3rd respondent herein, in execution of a money-decree. The appellant executed a security-bond on 11th December, 1923 undertaking to produce and hand over the 2nd defendant whenever the Court passed an order to produce him. The bond also provided that in

*A A O No. 106 of 1925. 24th November, 1925.

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default of the surety producing the 2nd defendant and handing him over to the Court, the amount of decree, interest, and costs shall be recovered by the plaintiffs from the surety personally. On the execution of the bond, the 2nd defendant was released from arrest. The plaintiffs applied to the Lower Court for an order that the surety be directed to produce the 2nd defendant and in default of producing him, the decree-amount be realised from him. The appellant contended that the decree of the plaintiffs against the 2nd defendant had been satisfied and that no execution could issue against him in execution of a decree already satisfied. The District Judge overruled the objection of the appellant and directed him to produce the 2nd defendant on or before a certain date and on his failure to do so that execution should issue against him. The appellant has preferred this Civil Miscellaneous Appeal.

Two points arise for consideration in this case, one of fact and the other of law.

The first point is whether the decree has been satisfied. Mr. Somayya for the appellant relies very strongly upon Ex. II which is the defendant's ledger in the account book of the plaintiffs. From the entries in the ledger it is found that a nil balance is struck. And Mr. Somayya's contention is that the decree-debt has been wiped off by payment. There are entries on both sides of the ledger and the balance is zero. In Ex. III, the ledger of the 3rd defendant, there is a debit entry of Rs. 5,000. It is argued for the appellant that the 3rd defendant paid Rs. 5,000 in discharge of the decree-debt and thereby the decree-debt has been fully satisfied.

Ex. I is the day-book and in it there is an entry that the decree in O. S. No. 2 of 1923 has been transferred to Adapala Varada Reddi for Rs. 5,000 and a promissory note for the sum of Rs. 5,000 has been obtained this day from him.

Mr. T. V. Venkatarama Aiyar for the respondents 1 and 2 contends that there was no transfer of the decree in favour of Adapala Varada Reddi, the 3rd defendant in the case, but there was only an agreement to transfer the decree to him. Ex. A, pro-note executed by Varada Reddi in favour of the plaintiffs, on 10th January, 1924 contains a recital that Varada Reddi had arranged to take a transfer of the decree-debt from the plaintiffs. The entry in the day-book is of the same date as that of the pronote. The 3rd defendant was only a surety for defendants 1 and 2, and in the razinama decree, he is made liable only for 2|5ths

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of the decree amount in case the plaintiffs were unable to realise the decree-amount from defendants 1 and 2. It is unlikely that when he was made liable only for 2|5ths of the amount in case the plaintiffs were unable to obtain satisfaction from the defendants 1 and 2 that he would discharge the whole of the decree amount by undertaking to pay Rs. 5,000. There is no evidence that the decree has been transferred to the 3rd defendant. The appellant's contention is, that the entry has been transferred should be taken to mean that the decree was transferred on the 10th January, 1924. Taking the entry alone, in Ex. A, it cannot be said that the decree has been transferred to the 3rd defendant. The onus is upon the appellant to show that the plaintiffs have transferred the decree and that they could not apply for execution. On a consideration of the evidence we have no hesitation in holding that the decree was not transferred to nor was any amount paid towards the decree, by the 3rd defendant. The appellant has not shown that the decree has been satisfied by any amount being paid by the 3rd defendant Varada Reddi.

The next question is, granting for argument's sake, that the decree amount was paid by the 3rd defendant, can the appellant take advantage of the payment, when the payment has not been certified by the Court as required by O. 21, R. 2. The appellant's argument is that the surety is not a party to the decree and he could not apply to the Court to enter up satisfaction of a decree which has been satisfied by payment by the 3rd defendant. The surety is not a party to the decree but becomes a party only for a limited purpose, that is for purpose of appeal when an order is made against him under S. 145, Civil Procedure Code, vide *Ramanathan Pillai* v. *Doraiswami Aiyangar* (1). The fact that he is not a party to the decree is no ground for getting round a definite provision of law under O. 21, R. 2, cl. (3).

Mr. Somayya strongly urges that the said provision is contained in processual law and should not be held to override positive law and under the law of contract a surety is not bound to pay, when the debt which he undertook to pay in case of default of the principal debtor has been paid off or adjusted. Whatever may be the policy of the legislature in enacting cl. 3, the Court is bound to give effect to it. Where the decree is adjusted wholly or in part the judgment-debtor should apply

1. (1919) I L R 43 M 325 : 38 M L J 65.

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within 3 months to the Court and that such adjustment or payment should be recorded as certified and if he fails to do so, he cannot plead adjustment or payment in answer to the execution of the decree against him. Considerable reliance is placed by Mr. Somayya on the interpretation of O. 21, R. 16 by the Madras High Court that the executing Court has a discretion to refuse execution at the instance of a transferee of a decree.

In *Rama Ayyan* v. *Srinivasa Pattar* (2) the judgment-debtor transferred some of his immoveable properties to a person in consideration of his paying the judgment-debt to the original decree-holder. The vendee without paying the decree-holder the amount of the decree, got a transfer of the decree to himself and, as assignee, applied for execution. It was held that he was not entitled to execute the decree when he himself in spite of his undertaking to discharge the decree had fraudulently obtained a transfer of the decree from the decree-holder. Mr. Justice Subramania Aiyar observed at p. 232, with regard to S. 258 of the Old Code corresponding to O. 21, R. 2, of the present Code "The last paragraph prohibits judgment-debtors, who omit to apply under the second paragraph or having applied fail to establish their case, from relying in execution proceedings upon any payment, satisfaction or adjustment not duly certified. Manifestly therefore the enquiry under the said second paragraph can take place only between a person standing in relation of a judgment-debtor and a judgment-creditor."

The surety not being a party to the decree could not apply under O. 2, R. 2. I am unable to accept the argument that a surety though he is not a party to the decree could not ask the Court to hold an enquiry as to the decree being satisfied by payment or adjustment provided the application is made within the time allowed by the law. Though he has no *locus standi* to insist upon an enquiry he could apply to the Court to hold an enquiry inasmuch as he has an interest in showing that the decree has been satisfied. In *Ponnuswami Nadar* v. *Lutchmanan Chettiar* (3) there was a difference of opinion between Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar as regards the question whether the prohibition regarding uncertified adjustment will or will not apply while the adjustment is made by a 3rd party.

2. (1895) I L R 19 M 230 : 5 M L J 218.
3. (1911) I L R 35 M 659 : 22 M L J 170.

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In *Ramayya* v. *Krishnamurthi*(4) it was held that "O. 21, R. 2, did not disentitle a judgment-debtor from proving facts that a transferee of a decree applying for execution was merely a benamidar for another judgment-debtor."

These cases have no application to the present question and they do not throw any light upon the points raised in this case. The real question is whether a surety can plead adjustment or the discharge of a decree when the judgment-debtor himself could not successfully put forward that plea. In this case the payment or adjustment was not certified by the Court as required by O. 21, R. 2, and therefore execution could proceed against the 2nd defendant.

When there is an executable decree against the 2nd defendant can it be reasonably contended that so far as the surety is concerned there is no executable decree? The Court cannot recognise any adjustment or payment out of Court unless certified as is required by law and in the absence of such certificate, a decree-holder, however, fraudulent his conduct may be is entitled in law to execute his decree against the judgment-debtor, and so long as he is entitled to execute the decree against the judgment-debtor, a surety, who undertakes to pay the decree-amount, cannot plead that there is no decree against the judgment-debtor and therefore he is released from liability under the bond. S. 145 says "When any person has become liable as a surety, a decree or an order may be executed against him to the extent to which he has rendered himself personally liable." On the failure of the surety to carry out the terms of the bond he makes himself liable for the amount of the decree or for such amount as he has undertaken to pay.

It is next suggested that the original decree is not executed against the surety but a second decree passed on his failure to carry out his undertaking and therefore that decree is different from the original decree. No second decree is passed against the surety. The order under S. 145 is passed when he makes himself liable by failing to carry out the terms of the bond to the extent to which he has rendered himself liable. The decree that is executed against him is the decree passed in the suit and therefore it cannot be said that a second decree is passed against him.

The contention of Mr. Somayya for the appellant that uncertified adjustment or payment could be pleaded by the surety, was specifically negatived in a recent case decided by a

4. (1916) I L R 40 M 296.

Bench of the Calcutta High Court in *Onkarmal Agarwala* v. *Nritya Gopal Chaki* (5). The learned Judges observe at p. 886 "the surety is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified by the Court." Virareddy *v.* Devi Reddy Pattabhirami Reddy and Company.

In the result we have no hesitation in holding that so long as there is an executable decree against the judgment-debtor the surety is not relieved from his liability to pay the decree amount under the terms of the security bond executed by him.

The appeal fails and is dismissed with costs.

T. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Rama Reddy ... *Appellant** (*3rd respondent in S. A. No.* 1230 *of* 1921 *on the file of the High Court—3rd defendant.*).

*v.*

Ranga Dasan and others ... *Respondents* (*Appellant and Respondents* 4 *and* 5 *in do Plaintiff and defendants* 4 & 5.).

*Limitation Act, Art.* 134—*Temple property—Alienation improper by trustee of—Suit to recover property—Limitation.* Rama Reddy *v.* Ranga Dasan.

Art. 134 of the Limitation Act does not apply to a suit for the recovery of temple property improperly alienated by the trustee.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Madhavan Nair in S. A. No. 1230 of 1921 preferred to the High Court against the decree of the District Court of Coimbatore in A. S. No. 33 of 1921 preferred against the decree of the Court of the Principal District Munsif of Erode in O. S. No. 713 of 1918.

*T. R. Ramachandra Aiyar* and *N. P. Narasimha Aiyar* for appellant.

*T. M. Krishnaswami Aiyar* and *P. R. Ramakrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENTS:—*Devadoss, J.*:—This is an appeal against the judgment of Madhavan Nair, J., giving a decree to the Devadoss, J.

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*L. P. Appeal No. 158 of 1924. 28th October 1925.

5. (1922) 67 I C 885.

*See* S. A. No. 1230 of 1921 reported in 48 M L J 114.

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plaintiff. The 3rd defendant has preferred this Letters Patent Appeal. The question for determination is whether the suit is barred by Art. 134 of the Limitation Act. The plaintiff is the trustee of a temple. The finding is that the property is the property of the temple. The contention of Mr. Ramachandra Aiyar is that the suit is barred under Art. 134 inasmuch as the suit was brought more than 12 years after the date of the alienation. Art. 134 gives a period of 12 years for the recovery of possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration. The argument advanced is that the suit is barred by Art. 134 if the transferor is held to be a trustee and if he is not a trustee, then the suit is barred by reason of Art. 144 of the Limitation Act. The finding that the transferor is a trustee cannot be challenged now. The simple question is therefore whether Art. 134 applies to the case. It was decided in *Vidya Varuthi* v. *Baluswami Aiyar* (1) that a permanent lease of Mutt property granted by the head of the Mutt could not create any interest in the property to enure beyond the life of the grantor and consequently Art. 134 of Sch. I of the Limitation Act of 1908 did not apply to a suit brought by the successor of the grantor for the recovery of the property. Mr. Ramachandra Aiyar tries to get over this decision by contending that the transferee was only a lessee and that he did not deny the title of the Mutt but only contended that he was entitled to be in perpetual possession of the property being a permanent lessee. Mr. Ameer Ali in delivering the judgment of their Lordships observed:

> "It is also to be remembered that a 'trust' in the sense in which the expression is used in the English Law is unknown in the Hindu system, pure and simple."

With reference to the head of a Mutt or *Shebait* he observed :—

> "In no case was the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties resting on him he is answerable as a trustee, in the general sense, for maladministration."

In the case of a religious institution the property is vested in the idol and the trustee is only a manager for the time being. In the case of a Mutt the head of the Mutt for the time being is entitled to use the income of the Mutt property

1. (1921) I L R 44 M 831 : 41 M L J 340 (P C).

Rama Reddy v. Ranga Dasan.

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subject to the maintenance of the Thambirans and the ascetics attached to the Mutt. In the case of a trustee of a temple he is not entitled to use any portion of the income for himself. In the case of a wakf if the deed of trust makes provision for the maintenance of the Muthavali or the trustee for the time being, he may use the income for himself as allowed by the deed of trust, but in the case of Hindu religious institutions no trustee of any institution is entitled to use any portion of the income for himself if the property is vested in the idol. The decision in *Vidya Varuthi* v. *Baluswami Aiyar* (1) cannot be said to apply only to cases of leases. The remarks of their Lordships apply to cases of all alienations of property. A permanent lease is as much an alienation as a sale. The mere fact that rent is payable by the permanent lessee does not make a permanent lease any the less an alienation than a sale. Has the trustee of a religious institution the right to alienate the kudivaram interest in the temple property ? Can it be said if he lets into possession tenants so as to enable them to acquire occupancy rights, that he does not alienate the kudivaram interest ? The mere fact that the tenants pay the melvaram to the temple cannot convert the transfer of the kudivaram into anything less than an alienation of it. A trustee, therefore, cannot convey a valid title to the transferee and therefore Art. 134 does not apply to a suit for the recovery of the temple property improperly alienated by the trustee. The case in *Subbayya Pandaram* v. *Mahomed Mustapha Marcayer* (2) has no application to the present case. In that case the property was vested in the trustees and it was sold in execution of a decree. It was held that the suit was barred by Art. 144. In that case it was distinctly found that the property was vested in the person against whom the decree was obtained and the property being vested in him he could by transfer give a title to the vendee and if the transaction is not set aside within 12 years the vendee gets a good title. The case in *Kuppuswami Mudaliar* v. *Samia Pillai* (3) does not touch the point under discussion. There the holder of a religious office was dismissed from the office, but he continued to be in possession of the property for more than 12 years after his dismissal and a suit by the successor was held to be barred. The property was vested in the person and he held the office for the time being and when he was dismissed from

1. (1921) I L R 44 M 831 : 41 M L J 346 (P C).
2. (1917) 32 M L J 85 : I L R 40 M 751. 3. (1921) 42 M L J 1.

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the office his possession became adverse to his successor and the successor not having sued within 12 years his suit was barred.

There are a few cases which may be said to support the contention of Mr. Ramachandra Aiyar that an invalid alienation of trust property should be set aside within 12 years and if not so set aside, the vendee under the invalid sale gets a good title. The decision in *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram* (4) and *Damodar Das* v. *Lakhan Das* (5) supports this view. In *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram* (4) the hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution. It was held that the possession delivered to the purchaser was adverse to the vendors, and after 12 years, the successor of the vendor could not recover possession of the property conveyed.

Their Lordships observed at page 279 :—

"There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchaser. The title remained in Chockalinga and Nataraja and the possession which was taken by the purchaser was adverse to them....................................." Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is the office attached to the other, but if there is, Art. 144 of the same schedule is applicable to the property. That bars the suit after 12 years' adverse possession."

In *Damodar Das* v. *Lakhan Das* (5) the Privy Council held that where two chelas divided two institutions and the property among themselves one chela could not recover the property on the death of the other. Sir Arthur Wilson, who delivered the judgment of their Lordships observed at page 894 :—

"It follows from this that the learned Judges were further right in holding that from the date of the *ekrarnama* the possession of the junior chela, by virtue of the terms of that ekrarnama, was adverse to the right of the idol and of the senior chela, as representing that idol, and that therefore the previous suit was barred by limitation."

There is no discussion in *Vidya Varuthi* v. *Baluswami Aiyar* (1) *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram* (4) and *Damodar Das* v. *Lakhan Das* (5). In view of their Lordships' decision in *Vidya Varuthi* v. *Baluswami Aiyar* (1), *Gnana Sambanda Pandara Sannadhi* v.

1. (1921) I L R 44 M 831 : 41 M L J 346 (P C).
4. (1899) I L R 23 M 271 : 10 M L J 29 (P C).
5. (1910) I L R 37 C 885 : 20 M L J 624 (P C).

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*Velu Pandaram* (4) and *Damodar Das* v. *Lakhan Das* (5) cannot be considered to be good law. The principle underlying these decisions seems to be this : that where the trustee of a religious institution who is only a manager for the time being, alienates any property belonging to the trust, he cannot give a valid title to the alienee, for he himself has no interest in the property and the alienee can only get what the manager himself possesses, namely, of being in possession of the property. The principle of adverse possession would apply to cases where a person who could assert his title does not assert his title within the period fixed by Art. 144 of the Limitation Act. In the case of a minor whose property has been improperly alienated by the guardian he has the right of suit within three years after his attaining majority. The legal fiction is that an idol is a minor for all time and it has to be under perpetual tutelage and that being so, it cannot be said that the idol can ever acquire majority; and a person who acquires title from a trustee of a temple cannot acquire any title adverse to the idol, for the idol is an infant for all time and the succeeding trustee could recover the property for the idol at any time. Though the language has been loosely used as if the trustee occupies a position similar to that of the karnavan of a Malabar tarwad, or the managing member of a joint Hindu family, or the guardian of a minor, yet his position is different from that of any of these. It is contended by Mr. Ramachandra Aiyar that a trustee can alienate the property for certain purposes. In order to preserve the trust or with the sanction of the Court he could alienate the property but such alienation is under exceptional circumstances. But where he purports to convey the title to the property which is vested in him the vendee cannot be said to derive title from a man who could never give a good title to him. If the vendee buys knowing that the trustee has no right to convey title to the property which is vested in the idol, he cannot set up Art. 144 in answer to a suit by the trustee for the recovery of the property. His possession is that of the trustee and a trustee's possession can never be adverse to the idol. No doubt if a person takes possession of the immoveable property belonging to a temple and keeps the trustee and the persons connected with the temple out of possession and is able to assert such possession adversely to the trust for over 12 years,

4. (1899) 23 Mad 271 : 10 M L J 29 (P C).
5. (1910) L R 37 Cal 885 : 20 M L J 624 (P C).

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he could acquire a valid title under S. 28 of the Limitation Act. But where such a person acquires possession from the manager, his possession can only be with the consent of the trustee for the time being and therefore his possession can never become adverse to the temple. The observations of one of us in *Jagga Row Bahadur Garu* v. *Gonhar Bibi* (6) apply to the present case :—

"If the properties are trust properties any person claiming from a trustee cannot acquire a prescriptive title against the trust. Whether the document is valid or invalid, it would not give a right to anybody claiming under that document to prescribe for a title against the trust."

Madhavan Nair, J. held similarly in *Lakshminarayana Kulluriva* v. *Rajamma* (7). In a recent case* Phillips, J. held that a permanent lesseee could not set up the bar of limitation in a suit for recovery of possession of the property by the trustee. He held that Art. 134 did not apply to that case. As regards the contention that Art. 144 applied, the learned Judge observed :—

"This contention was negatived by their Lordships on the ground that the idol had no power to bring a suit except through the trustee. Consequently there could be no question of the suit being barred inasmuch as it could not have been brought at an earlier date."

Reliance is placed upon *Ramrup Gir* v. *Lalchand Marwari* (8). In that case the Patna High Court held that the alienation by the Mahant did not give a good title to the alienee unless it is proved that the alienation was one which could bind the institution. In the course of the judgment, Das, J. observed :—

"In my opinion the true rule is this, where the property is vested in the juridical person as it was in *Damodar Das's case* (5) and the Mahant is only the representative and manager of the idol, the act of alienation is a direct challenge upon the title of the idol, and the idol, or the manager of the idol on behalf of the idol must bring the suit within twelve years from the date of the alienation. But where the title is in the Mahant or the Shebait, as it was in the two other cases to which I have referred, the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment, and there is no adverse possession so long as the person making the alienation is alive; and the possession of the defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation."

With due respect to the learned Judge I am unable to follow his reasoning as regards the property vesting in an idol. Where the manager alienates property belonging to an idol

5. (1910) I L R 37 Cal 885 : 20 M L J 624 (P C). 6. (1922) 17 L W 521.
7. (1924) 21 L W 256. 8. (1922) 67 I C 401.
*Rao Bahadur Govinda Rao v. Chinna Thurai Pillai, 49 M L J 640 at 643.

Rama Reddy *v.* Ranga Dasan. Devadoss, J.

his act cannot be said to be a challenge on the title of the idol. When the idol is incapable of asserting its will except through its manager how can it be said that the manager's act is a challenge on its title? An idol as I have already observed being under perpetual tutelage can never assert its will and therefore the manager or the trustee, who alienated its property cannot by his act be said to challenge the title of the idol. He might as well set up his own title against the idol. Can any express trustee or manager of a temple set up his own title against the trust or the temple? If the manager cannot set up an adverse title to the property vested in the idol, can he by his act allow a person who derives title from him to assert a title which he himself could not assert against the idol. The case in *Ramrup Gir* v. *Lalchand Marwari* (8) is against the principle of the decision in *Vidyavaruthi* v. *Baluswami Aiyar* (1) and therefore it cannot be relied upon in support of the argument of 1st respondent.

In the result the appeal fails and is dismissed with costs of 1st respondent.

Waller, I.

*Waller, J.* :—I agree.

T. S. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

The Mylapore Hindu Permanent Fund, Ltd. ... *Plaintiffs**

*v.*

Chinniah ... *Defendant.*

Mylapore Hindu Permanent Fund, Ltd., *v.* Chinniah.

*Contract Act, S. 74—Penalty—Stipulation by way of—Relief against—Benefit Fund—Loans to shareholders—Stipulation that in case of death of shareholder and of his legal representative not continuing as shareholder loan should become payable immediately at enhanced interest—If a penalty—Provision in Articles of Fund for a shareholder ceasing to be such on change of religion or on insolvency—Validity—Provision for application by legal representative for transfer of shares—Validity.*

The Mylapore Hindu Permanent Fund, Limited, was a registered company goverened by its Memorandum and Articles of Association, and the defendant's deceased father was a shareholder of the company. The Fund first granted to the defendants' father, what was called, a special loan, that is, a loan advanced on a promissory note secured by an equitable mortgage effected by the deposit of title deeds of immoveable property. There were also subsequent loans made to the defendants' father as ordinary loans.

Article 55 of Articles of Association relating to the Fund provided:—"Subject to the provisions of Article 58, the death of a shareholder shall operate as a withdrawal of his shares from the date of the receipt of information in the

*C. S. No. 882 of 1924. 2nd December, 1925.

1. (1921) I L R 44 Mad 831 : 41 M L J 346 (P C). 8. (1922) 67 I C 401.

Mylapore Hindu Permanent Fund, Ltd., *v.* Chinniah.

Fund of such death." Art. 58 provided that where a shareholder died, his legal representative might request the Fund to transfer the shares to such representative and that thereupon the Fund should transfer the same. Art. 33 provided that if the borrower ceased to a shareholder on the day on which he so ceased to be, the amount of any special loan taken by him became repayable. In the subsequent deeds of mortgage executed by the defendant's father in respect of the further loans advanced to him as ordinary loans, there was a similar provision made in cl. (6) of the mortgage deed. Art. 43 of the Fund provided that both in respect of the amount of all special loans that fell due and payable and also in respect of the amount of ordinary loans which became payable under the articles the interest should be paid at 2 pies per rupee instead of at 7 per cent. per annum or 6 1|4 per cent. per annum as the case might be.

In a suit brought by the Fund against the defendant on all the mortgages, the question was whether the Fund was entitled to recover from the defendant interest at the enhanced rate as from the date of the death of her father. It was admitted that the defendant did not. on the death of her father, apply to the Fund for a transfer of his shares to her, as required by Article 58, so that admittedly the defendant's father ceased to be a shareholder and the defendant did not continue as shareholder in the Fund. The defendant nevertheless contended that as the provisions of the articles of the Fund and of the deed of mortgage executed in respect of the ordinary loans stipulated for a penalty of a two-fold nature, viz., interest at an enhanced rate, and immediate payment without reference to the periods fixed under the contracts or under the articles, the stipulation was in the nature of a penalty and she ought to be relieved against the same.

*Held,* overruling the contention, that having regard to the special circumstances connected with the Fund in question and the articles of association, the two-fold character of the penalty could not be regarded as really penal in the eye of the law.

Art. 55 of the Fund provided:—"Subject to the provisions of Art. 58 the death of a shareholder or his adjudication as an insolvent or his change of religion whereby he ceases to be a Hindu shall operate as a withdrawal of his shares from the date of the receipt of information in the Fund of such death, adjudication, or change or religion."

*Quaere* as to the legality of the provisions in the article with regard to the legal consequences which were said to result by virtue of the article on a person ceasing to be a Hindu and embracing another faith. Whether such a provision would not be opposed to public policy.

*Quaere,* whether the provision that on the insolvency of the shareholder he ceased to be a shareholder would not also be regarded as opposed to general principles of law.

There is nothing unreasonable in the provision in Art. 58 that a request for the transfer of the shares in the name of the legal representative should be made by such repressentative.

C. S. No. 882 of 1924.

Ordinary Original Civil Jurisdiction.

*P. Venkataramana Rao, S. Venkatasubbu Mudaliar* and *V. Ganapathi Aiyar* for plaintiff.

*S. Rajam Aiyangar* for respondent.

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The Court delivered the following

JUDGMENT:—Some very interesting questions have been raised in the course of the discussion of this case, but the main question for determination is merely whether the plaintiff Fund is entitled to recover from the defendant interest at the enhanced rate claimed as from the death of her father, the Original debtor to the Fund. This Fund, which is called the Mylapore Hindu Permanent Fund, Limited, is a registered Company governed by its Memorandum and Articles of Association. The chief object of the company on a perusal of the rules and regulations would appear to be to grant loans only to persons who are shareholders of the company or who agree to become and do become shareholders of the company for the purpose of obtaining the loans applied for. It seems to me that it would be necessary to bear this chief provision in the rules in mind in coming to a decision on the question raised.

The first loan made to the defendant's predecessor was, what is called, a special loan, that is, a loan advanced on a promissory note secured by an equitable mortgage effected by the deposit of title deeds of immoveable property. In this case there were also subsequent loans made to the defendant's predecessor as ordinary loans. The enhanced interest is claimed in respect of all these transactions.

The contention on behalf of the plaintiff with regard to this claim for payment of enhanced interest is this. As the company or the Fund grants loans only to subscribers or, as they are called shareholders, the provisions contained in Art. 55 of the Articles of Association relating to this Fund become necessary to be considered. It is as follows:—"Subject to the provisions of Art. 58, the death of a shareholder or his adjudication as an insolvent or his change of religion whereby he ceases to be a Hindu shall operate as a withdrawal of his shares from the date of the receipt of information in the Fund of such death, adjudication or change of religion." I entertained and still entertain very serious doubts as to the legality of the provisions in this article at any rate with regard to the legal consequences which are said to result by virtue of this article on a person ceasing to be a Hindu and embracing another faith. The legal consequences are undoubtedly in the nature of a penalty or forfeiture of benefits. The question is whether any provision that a contracting party should lose all the advantages of a contract on his ceasing to be a Hindu and embracing another religion would not be opposed to public

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policy thereby rendering such a condition absolutely illegal and unenforceable. The learned vakil for the plaintiff Fund argued that the whole constitution of the Fund was Hindu, that the Fund admitted only Hindus as subscribers and shareholders and even refused under its articles to make loans to others than Hindus and that, therefore, in these circumstances there was nothing in Art. 55 to constitute it a violation of the principles of public policy. I should have had very little hesitation in holding that it would be against public policy, because it seems to me that the general principle of law that no man should be directly or indirectly prevented from giving effect to a conscientious change in his religious convictions is a principle even higher than that of mere freedom of contract so-called. Whatever the sacredness may have been in which the so-called freedom of contract was held at one time, not only by law and legislature but also by political thinkers that prniciple has yielded to a very large extent both in modern theory and practice. Mr. Venkataramana Rao in support of his contention that provisions with regard to forfeiture on change of religion were recognised as valid by law referred to two cases, namely *Hodgson* v. *Halford* (1), and *In Re Dickson's Trust* (2). Both these cases were cases of testamentary bequests which were really in the nature of gifts, and I cannot regard that the principles applicable to a case of testamentary bequest are equally applicable to contracts supported by consideration. The question would also have to be considered, if it should ever arise, whether the provision that on the insolvency of the shareholder he ceases to be a shareholder should not also be regarded as opposed to general principle of law. In this case, however, I have only to do with the death of the subscriber. For this purpose, however, it is not necessary to decide the question how far, if the provision stood alone and without such an article as Art. 58, it may be regarded as not opposed to public policy or general principles of law. But Art. 58 provides that where a shareholder dies, his legal representative may request the Fund to transfer the shares to such representative and that thereupon the Fund shall transfer the same. The result of this article merely amounts to this. The Fund refuses to regard the legal representative as the assignee or transferee by the operation of law merely of the shares and requires that a request to such effect should be made by the legal representative. If all that become vested in the legal

1. (1879) L R 11 Ch 959. 2. (1850) 61 E R 14.

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representative were merely rights and it was not a case of bundle of rights and obligations, no doubt any rule which provides for some necessary condition being satisfied before such rights are regarded as transferred or assigned by operation of law may be deemed as improper. But a shareholder has not only rights in the company or against the company but is also under certain obligations of a contractual character. Merely because the shareholder has died, it would not follow that the legal representative, whoever he may be, would be ready and willing to assume also those obligations. I am therefore unable to regard as anything unreasonable the provision in R. 58 which requires that a request for the transfer of the shares in the name of the legal representative should be made by such representative. In this case it is admitted that no such request was made. By virtue therefore of these two rules it came to pass that the shareholder ceased to be a shareholder and the legal representative did not continue as shareholder in the Fund. Then we come to Art. 33 by which it is provided that if the borrower ceases to be a shareholder on the day on which he so ceases to be, the amount of any special loan taken by him became repayable. In the subsequent deeds of mortgage executed by the predecessor of the defendant in respect of the further loans advanced to him as ordinary loans, there is a similar provision made in cl. (6) of the mortgage deed. No dispute or question has been raised on behalf of the defendant with regard to the legal results following on this rule or article. But Art. 43 of the Fund provides that both in respect of the amount of all special loans that has fallen due and payable and also in respect of the amount of ordinary loans which has become payable under the articles the interest shall be paid at 2 pies per rupee instead of at 7 per cent. per annum or 6 1|4 per cent. per annum as the case may be. The result of all these provisions read together is that when a shareholder of this Fund dies and when the legal representative does not elect to continue as shareholder, all the loans taken by him from the Fund, whether special or ordinary become repayable at once without any regard whatever to the time that might have been fixed for repayments and that the amounts of such loans would carry interest from such date at 2 pies per rupee per month. The contention that has been argued is that this provision is penal and that the defendant should be relieved against it. At 2 pies per rupee per month the interest comes to 12 1|2 per cent. per annum, so that the stipulation merely

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amounts to this that if default be made in the payment of the amount that has become payable interest shall be paid at 12 1|2 per cent. per annum. Even if the provision should be construed to be penal in its character and it should be decided that the plaintiff Fund would be entitled to reasonable compensation only for such default, it is impossible to hold that the rate of interest made payable namely at 12 1|2 per cent. per annum could be regarded as unreasonable. Reference has been made in this connection to the case of *Srinivasa* v. *Rangayya* (3), where Sir John Wallis, O.C.J. and Hannay, J. held that "when the alleged penal rate is a common rate of interest in every day transactions as 12 per cent. is here, we do not think there is any sufficient reason for departing from it." I take it that what the learned Judges meant to lay down was merely that even if it should be viewed as compensation the Court would be justified in such circumstances to award even by way of compensation a rate of interest which would make the total stipulated rate. But here, however, there is the further complication that by reason of the default made the penalty that followed was not merely the liability to pay this enhanced interest but also the liability to pay off immediately all the loans taken without reference to the periods fixed under the contracts or under the articles. If taking these two penalties together I should be satisfied that they constituted stipulations only by way of reasonable compensation for the default contemplated or committed and not by way of penalty chiefly intended to operate by way of terrorem over the party in order to secure primarily the performance of the original contract, then no question would arise whether the mere fact that the penalty was two-fold would render illegal the contract between the parties. Ordinarily I should have been disposed to hold that a two-fold penalty of such a character was liable to be regarded as penal. But it seems to me that there are special circumstances connected with this institution and the articles of association having regard to which it is not possible to regard this two-fold character of the penalty as really penal in the eye of law. The whole purport and scope of this institution is to make loan only to subscribers at a comparatively very low rate of interest. If for any reason the borrowers cease to be subscribers a special rate of interest is provided that it is also provided, no doubt, that the amount of the loan shall become

3. (1914) 1 L W 902.

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immediately payable. This latter provision may be regarded as a reasonable consequence of the entire principle underlying the constitution of this company or Fund, namely, that it is chiefly intended merely for the benefit of persons who are subscribers to the Fund. If that be so and the default happens to be that of a borrower ceasing to be a subscriber then both the penalties may follow or result. If ordinarily, however a borrower makes default in the payment of the money on the due date even then these rules as to the payment of enhanced interest would have operation and then the higher rate of interest would become payable. If that was what happened, it is impossible to regard the provision for payment of enhanced interest as penal, more especially if the total rate of interest provided for and payable under such provision cannot possibly be regarded as exhorbitant. But when a man ceases to be a subscriber not only is there default on his part with regard to his contractual obligations but there is also the fact that the security which the Fund or Company expected to be possessed of is reduced. In the contractual obligation of every borrower who is a subscriber and who binds himself to pay to the company as and by way of shares a sum of money every month there is some further security to the Fund for the loans advanced and if default be made in such obligation then it follows that the security expected by the Fund becomes reduced. It is possible to attribute the provision for the amount of the loan becoming repayable on a borrower ceasing to be a subscriber to the fact that by reason thereof the security becomes reduced. In any case as I have already observed it is only if I came to the conclusion that taking both together the amount of the loan becoming repayable immediately and the stipulation as to the payment of interest at 12 1|2 per cent. per annum the compensation provided should, in the circumstances of the case be held to be unreasonable, I shall be justified in regarding them as penal and seeking to relieve the party against it. Here in this case the default has been really of a two-fold character default in the continuous payment of the shareholders' subscriptions by reason whereof the party ceased to be a shareholder and also the non-payment of the amount of the loan which became due. The two-fold nature of the so-called penalty seems to be the mere accidental result of the nature of the default in this case and it is not necessary to regard the legal consequences that have followed as penal in their cha-

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racter. After all, the interest now claimed is only 12 1|2 per cent., and it has not been argued that this rate of interest cannot be regarded as reasonable having regard to the money market at the present day. There has been really no plea raised on the question of the amount having become payable on the death of the predecessor of the defendant and as I have come to the conclusion that the rate of interest claimed is not penal and that in the circumstances, I am not called upon to give relief on that ground, I hold that the plaintiff Fund is entitled to interest at the rate of 12 1|2 per cent. per annum from the death of the defendant's father.

On this basis the plaintiff's claim has now been proved. The promissory note and the equitable mortgage by deposit of title-deeds in respect of the special loan as also the subsequent deed of mortgage have been proved. The total amount of principal due on the death of the defendant's predecessor has been proved to be Rs. 5,377-7-9 and the amount with interest up-to-date is admitted to be Rs. 7,676-6-6. There will be a decree for this amount. Usual mortgage decree. Further interest at 12 1|2 per cent per annum on the principal sum from this date till date fixed for redemption. Time for redemption six months. There will be no personal decree against the defendant. The plaintiff Fund may take the costs of this suit from the sale proceeds. I direct that to the defendant's guardian-ad-litem the plaintiff do pay a further sum of Rs. 50 and include the total sum of Rs. 150 in the plaintiff's costs of this suit.

A. S. V. *Decree for plaintiff.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Chowdappa Gounder, a creditor of the Insolvent Kathaperumal Pillai, for himself and on behalf of all the creditors ... *Appellant**

*v.*

Kathaperumal Pillai and others... *Respondents (Respondents 1 and 2 and petitioner).*

Chowdappa Gounder *v.* Kathaperumal Pillai.

*Provincial Insolvency Act (V of 1920), S. 75 (1) and (2)—Application by Official Receiver under S. 53—Dismissal of—Appeal by creditor—If maintainable—Person aggrieved—Appellant not party in Court below—Omission to move*

*A A O No. 364 of 1923. 25th January, 1926.

Chowdappa Gounder *v.* Katha-perumal Pillai.

*Official Receiver to appeal—Effect of—Fraudulent nature of alienation—Enquiry as to.*

An Official Receiver applied under S. 53 of the Provincial Insolvency Act to declare void as against him an assignment or sub-lease made by the insolvent. The application was dismissed, and one of the creditors who was not *eo nomine* a party to the application, filed an appeal against the order without first moving the Official Receiver to file an appeal himself. *Held,* he was a person aggrieved by the order of the Lower Court within the meaning of S. 75 and could appeal against the order.

*Per Wallace, J.*:—In original proceedings in insolvency, where an individual creditor's interests are opposed to the interests of other creditors so that the Official Receiver cannot effectively represent his claims, a motion may be made by an individual creditor and likewise an appeal; but where his interests are homogeneous with those of the other creditors, the proper person to move is the Official Receiver. But in the matter of appeals, an individual creditor can always appeal, whether or not the Official Receiver does; but if in the matter of appeal his interests are homogeneous with those of the rest of the creditors, he must do it in a representative capacity on behalf of all the creditors. The mere fact that in his individual capacity he was not a party to the original petition does not preclude him from appealing, as he was sufficiently represented by the Official Receiver.

*Per Madhavan Nair, J.*:—A person is aggrieved by an order where he is a party to an order, or, even if he is not, he is bound by the order and it affects his interests.

*Per curiam*:—A District Judge cannot in an application under S. 53 decline to go into the matter of the nominal or fraudulent nature of the alieantion.

Case-law referred to.

Appeal against the order of the District Court of Coimbatore dated 13th December, 1922 in I. A. No. 558 of 1922 in I. P. No. 47 of 1922, in the matter of Kathaperumal Pillai, Debtor.

*L. A. Govindaraghava Aiyar* for appellant.

*T. R. Ramachandra Aiyar* and *S. R. Dikshit* for respondents.

The Court delivered the following

JUDGMENTS:—*Wallace, J.*:—The first question in this appeal is whether an appeal lies. The Official Receiver of Coimbatore in proceedings in insolvency applied to the Lower Court under S. 53 of the Provincial Insolvency Act to declare void against him an assignment or sub-lease in favour of the 2nd respondent before it. The Lower Court dismissed the petition. The appellant before us is not the Official Receiver but one of the creditors; and a preliminary objection is taken that such an appeal by a single creditor is not competent. It does not appear that the appellant before appealing moved

Wallace, J.

Chowdappa Gounder v. Katha-perumal Pillai.

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the Official Receiver to appeal. For the purposes of this argument I assume that the Official Receiver was not moved to appeal.

The appellant relies very strongly on the general wording of S. 75, sub-clauses 1 and 2, which undoubtedly lays down that any creditor aggrieved by the decision of the District Court may appeal to the High Court in a matter of this kind. The short question then is, is the appellant a creditor aggrieved by this order and does the fact that he did not first move the Official Receiver to appeal make him any the less an aggrieved creditor?

Now, the general scheme of the Act is that in insolvency proceedings creditors cannot act individually and independently but are represented by the Official Receiver who alone may ordinarily take action. Clearly, however, the Official Receiver can act for the whole body of the creditors only when the interests of the whole body are homogeneous; if the interests of individual creditors conflict, then the Official Receiver cannot represent the interests of the creditor who is standing on his individual rights as opposed to those of the general body, so far as that right is concerned. Such a case would occur, for example, when the Official Receiver or some creditor wishes to have the debt of another creditor struck out as fictitious, or when one creditor wishes to be ranked as a secured creditor, or when an alienation in favour of one creditor is sought to be declared void under S. 53 or 54 of the Act. In such cases it seems to me clear that no one but the individual creditor can represent his individual interest, as distinguished from the interest he possesses homogeneous with those of the general body of creditors. The general principle thus would seem to be that where the insolvency proceedings under consideration concerns only an individual creditor and his interests, he alone can agitate the matter both in the original Court and in the appeal Court. Reference may be made in this connection to the reported ruling in *Khushhalai Ram* v. *Bholar Mal* (1). In such cases, however, there would ordinarily be an order by the Receiver as representing the general body of creditors, and a *fortiori*, the homogeneous interests of all individual creditors, including the creditor opposed to him in the matter of that creditor's individual claims, unfavourable to the individual creditor's individual claims and the latter would apply first of all to the Court under S. 68 for redress. (See

1. (1915) I L R 37 A 252.

Chowdappa Gounder *v.* Katha-perumal Pillai.

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*Thiruvenkatachariar* v. *Thangayiammal* (2)]. But, where the proceeding concerns the general interests of the general body of creditors, then individual creditors are not in the first instance permitted ordinarily to act individually but must be represented by and must act through the Official Receiver. What then is the principle to be invoked if the Official Receiver being moved on behalf of the general body of creditors, refuses to act. The proper principle, as I conceive, has been laid down by Cave, J. in *Ex parte Kearsley : In re Gense* (3): It is quoted in extenso in *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4).

That principle would, *prima facie,* apply equally to proceedings in the original insolvency Court and to proceedings in appeal from it. But, having regard to the generally adopted interpretation of the phrase " any person aggrieved " set out in the well-known case of *In re Sidebotham* (5) and adopted therefrom in various decisions in this country —see *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4) and *Kumrappa Chettiar* v. *Murugappa Chettiar* (6)—it must be admitted that S. 75 does give an individual creditor a wider right, *viz.*, a right to appeal in any case in which his interests are adversely affected whether it is his individual interests or his interests as one of the general body of creditors which are so affected, so that it is open to the individual creditor to appeal in a case where his interests are homogeneous with and not opposed to those of the whole body of creditors, even though he has not first moved the Official Receiver to appeal and had a refusal.

At the same time it is essential that the general principle that the individual creditor cannot without leave or order of the Court represent the whole body of the creditors, must not be lost sight of, and in cases where he does so it must be made clear that the appeal is on behalf of the general body of creditors. Following therefore the analogy of a suit by an individual creditor under S. 53 of the Transfer of Property Act [cf. *Pokker* v. *Kunhammad* (7) and *Ishwar Timappa* v. *Devar Venkappa* (8).] I would direct that before this petition of appeal be entertained and heard, the petition be amended so as to make it clear that the appellant is appealing on behalf of the general body of creditors, so that any order he may

2. (1915) I L R 39 M 479: 29 M L J 355.
3. (1886) 17 Q B D 1.
4. (1923) I L R 47 M 673 at 682.
5. (1880) 14 Ch D 458.
6. (1916) 36 I C 771.
7. (1918) I L R 42 M 143: 36 M L J 231.
8. (1902) I L R 27 Bom 146.

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Wallace, J.

obtain will enure on their behalf and be worked out if necessary by the Official Receiver.

The general principles on which such insolvency proceedings ought to be conducted would then be these : In original proceedings in the Insolvency Court in which an individual creditor's individual interests are concerned, and are opposed to the interests of other creditors so that the Official Receiver cannot represent the individual creditor's individual claims a motion may be made by the individual creditor and an appeal may be made by him also ; but when in the original proceedings the individual creditor's interests are homogeneous with those of the rest so that the Official Receiver can represent all, the proper person to move is the Official Receiver and the individual creditor cannot move unless there is a decision of the Official Receiver against him under which he can come up under S. 68. But in the matter of appeals an individual creditor can always appeal whether or not the Official Receiver does ; but if in the matter of appeal his interests are homogeneous with those of the rest of the creditors, then in such a case he must make his petition a representative petition on behalf of all the creditors.

I do not think that the fact that the appellant was not in his individual capacity a party to the original petition precludes him from appealing. This individual creditor was in matters in which his interests are homogeneous with those of the general body of creditors sufficiently represented in the original Court by the Official Receiver who was a party to the original proceedings.

Various decisions have been quoted at the bar. I shall refer only to a few of them. *Iyappa Nainar* v. *Manicka Asari* (9) is no authority against a right of appeal in this case. There the creditors' interests were not affected in any way and it was held therefore that he had no right of appeal at all. The case *Appireddi* v. *Appireddi* (10) is not a case of an appeal and S. 75 did not come under consideration. Ordinarily, as I have said, where the interests of all creditors are involved, the individual creditor cannot move in the original Court unless and until the Official Receiver has refused to move. The same rule is laid down in *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4) and *Hemraj Champa Lall* v. *Ramakishen Ram* (11). The respondent relied strongly on

9. (1914) I L R 40 M 630.

10. (1921) I L R 45 M 189: 41 M L J 606.

4. (1923) I L R 47 M 673.

11. (1916) 2 Pat L J 101.

*Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4). That however was a case in which the Court did not deny the right of a creditor to come up on appeal, but only held that he had been premature and should have applied himself to the original Court in place of the Official Receiver who refused to act under Ss. 53 and 54 of the Act to have the alienation set aside, and it was laid down generally that the principle must be safeguarded, that a creditor should ordinarily act on behalf of the whole body of creditors, and if necessary for that purpose, should apply for and obtain permission to use the Official Receiver's name. The same principle was safeguarded in another way in *Jagannatha Aiyangar* v. *Narayana Aiyangar* (13) by the Court directing that the proceedings after remand ordered on appeal by an individual creditor should be conducted by the Official Receiver. The respondent relies on the wording in *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4) with reference to the right of appeal under S. 75: "We see no reason why we should not. . . .hold that a creditor can appeal when he is a party to the decision appealed against," and it is sought to deduce the inference that he cannot appeal when he is not a party to the decision appealed from. As to this, I think, as I have said, that as his interests in that case are homogeneous with those of the general body of creditors he need not have been represented in the original proceedings in his individual capacity; it is sufficient that he was represented by the Official Receiver. In *The East India Cigarette Manufacturing Co., Ltd.* v. *Ananda Mohan Basak* (14) an individual creditor whose individual interests were at stake was allowed to appeal and make the Official Receiver a party in order to have on record the general body of creditors. The previous view in the Allahabad High Court set out in *Jhabba Lal* v. *Shib Charan Das* (15) that the provisions of Act III of 1907 did not allow an individual creditor to appeal has been altered in deference to the wording of the present S. 75—see *Chikri Prasad* v. *Aziz Ali* (16) and *Niadar* v. *Ramji Lal* (17).

I would therefore allow the appeal to be argued provided the appellant amends his appeal petition to make it clear that

4. (1923) I L R 47 M 673 at 682: s. c. 18 L W 857.
5. (1880) 14 Ch D 458.
13. (1919) 52 I C 761.
14. (1919) 24 C W N 401.
15. (1916) I L R 39 A 152.
16. (1921) I L R 44 A 71.
17. (1925) 23 A L J 503.

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his appeal is presented by him as representative of the general body of creditors, and then he may be heard on the merits.

*Madhavan Nair, J.* :—The facts of this case are very simple. One Kathaperumal Pillai was adjudicated as an insolvent. He had assigned a lease in his favour to the 2nd respondent. The Official Receiver at the instance of the present appellant, one of the creditors, filed an application before the District Judge to set aside this alienation under Ss. 53 and 54 of the Provincial Insolvency Act V of 1920. The appellant himself was not an actual party to the proceedings. The District Judge declined to set aside the alienation. The present appeal is against this order of the District Judge. The appellant, before filing the appeal, did not move the Official Receiver to file an appeal, but he has made him the 3rd respondent before us.

Mr. Ramachandra Aiyar on behalf of the 2nd respondent, the alienee, takes the preilminary objection that the appellant, inasmuch as he did not request the Official Receiver to file an appeal beforehand, is not himself entitled to file it. The appeal has been preferred under S. 75, Sub-section (2) of the Provincial Insolvency Act. S. 46 of Act III of 1907 gave a right of appeal to any person aggrieved by an order made in the exercise of insolvency jurisdiction. The Madras High Court in *Thiruvenkatachariar* v. *Thangayiammal* (2) held that an individual creditor was a person aggrieved and was entitled to appeal. In this view, as pointed out in *Niadar* v. *Ramji Lal* (17), the terms of S. 46 have been altered in the new Act in S. 75, Sub-section (1) to "The debtor, any creditor, the Receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction.....". Sub-section (2) of S.75 provides that, "Any such person aggrieved by any such decision or order of a District Court as is specified in Sch. I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court." There can be no doubt that the decision of the District Judge is clearly adverse to the interests of the appellant ; for it reduces the amount of property out of which he will be entitled to claim a dividend. It is conceded by Mr. Ramachandra Aiyar that the language of the section is certainly wide enough to include within its terms "any such person aggrieved by any

2. (1915) I.L.R. 39 M 479 : 29 M L J 755. 17. (1925) 23 A L J 503.

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such decision or order of a District Court" a creditor like the present appellant who was not an actual party to the original proceedings or who has not asked the Official Receiver to file an appeal. But he argues that, according to the decisions of this Court, an appeal by a creditor under this section is to be deemed incompetent if he is not an actual party to the proceedings, or if he has not moved the Official Receiver to file the appeal beforehand.

In my opinion, the position contended for is not warranted by the decisions of this Court. In *Kumarappa Chettiar v. Murugappa Chettiar* (18) when an objection was raised as regards the maintainability of an appeal filed by a contesting creditor in insolvency proceedings under S. 36 of the old Act (III of 1907), Krishnan, J., after a consideration of the English authorities as to who is a person aggrieved, stated as one of his conclusions that a person is aggrieved by an order where he is a party to an order, or, even if he is not, he is bound by the order and the order affects his interests, *i. e.*, his person or his property, injuriously." If so, the appellant though not a party, as "an aggrieved person" is certainly entitled to prefer the appeal. Oldfield, J., while agreeing with the conclusion of Krishnan, J., made the following observations : "The Official Receiver, from the moment at which the insolvent's estate vests in him, represents the body of creditors and ought to protect their interests. If in the exercise of his discretion he thinks it unnecessary to appear to do so, but finds that a particular creditor thinks an appearance necessary, the proper practice is for him to obtain an indemnity from such creditor and to carry on the contest, recovering his costs from him in case of failure." These remarks, in my opinion, do not lay down that an aggrieved creditor can prefer an appeal only in cases where the Official Receiver has refused to do so; they only indicate the usual practice and are meant to point out that the order passed in insolvency cases after the vesting of the estate in the Official Receiver will enure only to the advantage of the whole body of creditors. This decision was followed by Oldfield and Seshagiri Aiyar, JJ. in *Jagannatha Aiyangar v. Narayana Aiyangar* (13) with this remark : "This, however, we may observe, will not entitle the appellant (a creditor) to the conduct of the petition in the Lower Court, when it is dealt with there in pursuance of this order." In

13. (1919) 52 I C 761.

18. (1916) 36 I C 771.

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*Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4) the case most relied on by Mr. Ramachandra Aiyar, it was held that a creditor could move the Court to set aside a voluntary transfer or to avoid a fraudulent preference and that he could file an appeal against the order of the Lower Court. In the course of their judgment the learned Judges observed : "If the Official Receiver refuses to move the Court under S. 53 or 54, even though a creditor offers to indemnify him against costs in the event of an adverse order against him, such creditor can apply to the Court to permit him to use the Official Receiver's name, or make him a party to the proceeding and may move for an order under S. 53 or 54 ; and if the order is against him, if the Official Receiver refuses to appeal notwithstanding the offer of indemnity against the costs, the creditor can appeal against the order and may make the Official Receiver a party to the appeal." These remarks, while laying down a very salutory rule of practice, do not, in my opinion, support the contention that an aggrieved creditor cannot prefer an appeal under S. 75 (2) without first obtaining a refusal from the Official Receiver. The observation in the judgment "We see no reason why we should not . . . . hold that a creditor can appeal when he is a party to the decision appealed from" does not necessarily lead to the conclusion that an aggrieved creditor can prefer an appeal only if he actually figures in his own person as a party to the original proceeding. In the present case, the appellant was sufficiently represented by the Official Receiver in the Lower Court as his interests did not conflict with those of the other creditors and, in this sense, he may be deemed to have been a party to the original proceeding. It is true that in all the rulings of the Madras High Court that we have examined the creditor was an actual party to the proceedings and that in some of them there are remarks that a creditor, before he moves the Court, should apply to the Official Receiver to take the necessary proceedings; but it seems to me that none of the decisions goes the length of holding that a creditor can prefer an appeal against an adverse order passed by the District Judge only if he is an actual party to the proceeding, or only if the Official Receiver on being moved refuses to appeal. To import this limitation would be to cut down the general right conferred on an aggrieved creditor by S. 75 (2).

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4. (1923) I L R 47 M 673 at 682.

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The contention that has been advanced on behalf of the appellant is supported by the decision in *Chikri Prasad* v. *Aziz Ali* (16). In that case the original application was by the insolvent complaining under the old Act against an act of the Official Receiver and from the order passed by the District Judge a creditor preferred an appeal. In reply to the objection that no appeal lay, the learned Judges observed that S. 75 (2) of Act V of 1920 gives a right of appeal to any creditor against the decision of a District Court of the nature specified in schedule 1 of the Act. In *Niadar* v. *Ramji Lal* (17) the crops in suit were attached by a Receiver in insolvency at the instance of the appellant who was a creditor of the estate. The District Judge held that the crops were sold by the respondent and belonged to him and directed their release from attachment. The creditor preferred an appeal to the High Court under S. 75 (2). As regards the preliminary objection taken that no appeal lay, the learned Judges pointed out that the decision being adverse to the interests of the creditor, he was a person aggrieved and had, therefore, a right of appeal under S. 75 of the Act. It is not clear from the report whether the creditor was actually a party to the original proceedings.

In my opinion, the preliminary objection in this case should be overruled. The right conferred by S. 75 (2) is not to be fettered by considerations such as whether he was an actual party to the proceedings, or whether before he filed his appeal he moved the official Receiver to appeal. It is the policy of the insolvency law to administer an insolvent's estate in the interests of all the creditors. Any order that may be passed in favour of the appellant-creditor will enure only to the benefit of the entire body of creditors represented by the Official Receiver and not merely for his own benefit. Since the Official Receiver is a party to this appeal, there can be no difficulty, in the event of the creditor's success, in passing an order in favour of the Official Receiver, so that the advantage resulting from it may enure for the benefit of all the creditors. The same result may be achieved, as suggested by my learned brother, by directing that, before this petition of appeal be entertained and heard, the petition be amended so as to make it clear that the appellant is appealing on behalf of the general body of creditors, so that

16. (1919) I L R 44 A 71. 17. (1925) 23 A L J 503.

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any order he may obtain will enure on their behalf and be worked out by the Official Reeciver.

For these reasons, I would overrule the preliminary objection and proceed with the case. I agree with the order proposed by my learned brother.

This appeal and the Memorandum of Objections put in by the 2nd respondent coming on for further hearing this day after the amendment of the appeal petition in compliance with the order of Court contained in the above judgment dated 7th January, 1926.

The Court delivered the following

JUDGMENT:—The appeal petition has been amended and is now in proper form. The District Judge cannot decline to go into the matter of the nominal or fraudulent nature of the alienation. The "Separate Suit" he speaks of is not between the present parties and will not settle the matter at issue between them. We set aside his order and direct that the petition be re-heard and decided in the insolvency proceedings. Appellant will get his costs here up-to-date.

The Memorandum of Objection is dismissed.

T. S. V. *Appeal allowed and objection dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Thirukonda Ellarayan ... *Appellant** (*Defendant*)

*v.*

Nakonda Rangaswami Aiyar ... *Respondent* (*Pltff.*)

Ellarayan v. Rangaswami Aiyar.

*Civil Procedure Code, S.* 11—*Usufructuary mortgage—Covenant to pay—Suit by mortgagee—Final decree for sale, not executed—Subsequent suit for redemption—If maintainable.*

A usufructuary mortgagee instituted a suit for sale based on a personal covenant to pay contained in the document and obtained a preliminary decree for sale. The mortgage not having been redeemed within the time fixed, a final decree was duly passed, but the mortgagee did not execute the same, remaining in possession as before. Another mortgagee *pendente lite* subsequently brought a suit on his own mortgage and after purchasing the property in execution of his decree sued the usufructuary mortgagee for redemption. *Held,* the mortgagor's right to redeem having been once adjudicated upon and become merged in that decree, a subsequent suit for redemption was barred by *res judicata*. *Vedapurathi v. Vallabha Valiya Rajah*, I L R 25 M 300 (F B) and

*L P Appeal No. 32 of 1925. 7th January, 1926.

*Ranga Aiyangar v. Narayanacharlar,* I L R 39 M 896 followed; case-law discussed.

Effect of the repeal of Ss. 86 to 89, 92 and 93 of the Transfer of Property Act and their re-enactment in other forms in O. 34. Civil Procedure Code considered.

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Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Devadoss dated 23rd October, 1924 in S. A. No. 1139† of 1922 preferred to the High Court against the decree of the District Court of Madura in A. S. No. 289 of 1921 (O. S. No. 300 of 1920, the District Munsif's Court Madura Town.)

*T. L. Venkatrama Aiyar* for appellant.

*C. S. Venkatachariar* for respondent.

The Court delivered the following

Wallace, J.

JUDGMENTS:—*Wallace, J.*:—The original suit in this case was a suit for redemption of a mortgage. The suit property was mortgaged usufructuarily to the defendant on 29th August, 1904. In the mortgage was also a personal covenant to pay. The defendant sued on 2nd August, 1912 in O. S. No. 430 of 1912 and got a preliminary decree for sale on 14th October, 1913 and a final decree on 25th February, 1914. No action was taken by him under the final decree. On 2nd September, 1912, *pnedente lite* the same mortgagor mortgaged the property to the plaintiff's father. The plaintiff sued in O. S. No. 289 of 1918 and got a decree for sale in 1918, brought the property to sale and bought it in Court auction. He now sues to redeem the mortgage. The plaintiff was not a party to the suit of 1912, but the defendant contends that, as his mortgage was *pendente lite* and the plaintiff, therefore, has no higher rights than his mortgagor, and as the mortgagor did not choose to redeem under the decree of 1913, the mortgagor and therefore the plaintiff is barred by *res judicata* from redeeming. Both the Trial Court and the Lower Appellate Court held that the suit was barred by *res judicata*. In second appeal Devadoss, J., has held that it is not, and against this judgment this Letters Patent Appeal is filed. It has been ably argued at length before us by Mr. C. S. Venkatachariar for the plaintiff and Mr. T. L. Venkatrama Aiyar for the defendant.

The real question at issue may be shortly stated, but cannot be as shortly answered. It is, when a mortgagor has fail-

†Reported in 86 I C 527.

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ed within the time fixed in the preliminary mortgage decree for sale to pay up the amount due under the decree, and a final decree for sale has been obtained, does a suit for redemption by him lie or is his cause of action barred by *res judicata*? There is a long series of decisions, some taking one view and some the other, passed before and under the provisions of the Transfer of Property Act, but there is no direct decision under the present Civil Procedure Code after the repeal of Ss. 86 to 89, 92 and 93 of the Transfer of Property Act and their re-birth in other forms under O. 34 of the Civil Procedure Code. The most important case in this Court is the Full Bench decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1), passed under the old provisions of the Transfer of Property Act and the Civil Procedure Code, and, if the principles of that decision have not been reversed by the Privy Council and are still applicable in spite of the changes in the law, that decision is binding on this Bench. Otherwise, the matter is *res integra*.

The case with which the Full Bench had to deal was based on a usufructuary mortgage of 1858. There had been a suit and a decree for redemption, the decree being passed under S. 92 of unamended Transfer of Property Act containing a provision for sale of the mortgaged property, if the mortgage amount was not paid, but containing no foreclosure clause. The decree was not executed and the decree amount was not paid but no order absolute for sale under S. 93 was obtained by the mortgagee. A second suit for redemption was then filed and the Full Bench was called on to decide whether in these circumstances the second suit was maintainable. It was held by all five Judges that, whether or not the relationship of mortgagor and mortgagee subsisted, because of the fact that no order absolute under S. 93 had been obtained, and the property, therefore, had not been sold, the cause of action, namely the right to redeem, had become merged in the decree, and was, therefore, *res judicata* and no second suit for redemption would lie. We are not pointed to any subsequent decision of the Privy Council which has controverted that decision, and so far as it goes, therefore, it is binding on us. Mr. Venkatachariar, however, contends that, even accepting that position, the preesnt case differs from the Full Bench case in two vital particulars which will take it out of the purview of that decision. These differences are, first, that the first suit here on

1. (1901) I L R 25 M 300: 12 M L J 128.

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which the decree for sale was obtained was not a suit by the mortgagor for redemption but by the mortgagee for sale, and secondly, that the changes in the law since the Full Bench case render its principles no longer applicable. These two points may be dealt with together as they are intimately connected.

It is essential to recall the terms of the Transfer of Property Act under which that decision was passed. Under S. 88 of that Act, in the event of the plaintiff-mortgagee's success in a suit for sale the decree is first to take an account and declare the amount due and secondly, to order that, if the mortgagor pays the amount into Court within the time fixed, he shall be put in possession of the property, and thirdly, to declare that, if the amount is not so paid, the property shall be sold. S. 89 provided that, if the mortgagor pays the amount within the time fixed, he shall get possession, and that, if payment is not so made, the mortgagee shall apply for an order absolute for sale and obtain it and thereupon the mortgagor's right to redeem and the security shall both be extinguished. A decree in a foreclosure suit, Ss. 86 and 87, followed similar lines, and, in default of payment by the mortgagor, the plaintiff was entitled to obtain an order absolute declaring that the mortgagor is absolutely debarred from all right to redeem, and on the passing of such order the mortgage debt is deemed to be discharged. A decree for redemption Ss. 92 and 93 also followed similar lines, and the result of non-payment was that the defedant mortgagee may appy for an order absolute that the mortgagor is absolutely debarred from all right to redeem, or that the property be sold on the passing of such order the right to redeem and the security extinguished. In this Court it was held by the majority of the Full Bench in *Mallikarjuna Shetti* v. *Lingamurthi Pantulu, etc.* (2) that such orders absolute are not decrees but proceedings in execution. The decree to be executed was what is now styled the preliminary decree, and in such a decree, in a suit for sale or redemption the decree *inter alia* directed payment of the money by the mortgagor and delivery thereon of the property by the mortgagee.

Now Mr. Venkatachari's first point is this:—

When the decree for sale was under S. 89 and not under S. 93 it was open to the mortgagor even after the order absolute for sale to execute that decree so far as it was executable by him and to pay up the mortgage amount, in fact up to the

2. (1900) I L R 25 M 244 : 12 M L J 279 (F B).

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time when the property was actually sold; and he deduces therefrom that the right to redeem was not put an end to by an order absolute for sale under S. 89. This has, no doubt, been held in several cases, but it is essential to note that after the order absolute, payment was open to the mortgagor, not *qua* mortgagor under the provisions of the Transfer of Property Act, but *qua* judgment-debtor under the mortgage decree under the provisions of the Civil Procedure Code, which permit a judgemnt-debtor whose property is being sold in execution of a decree to pay up the decree amount at any time before the actual sale even under certain circumstances after the sale itself. It is true that some of these decisions, for example *Ramubai* v. *Brahmadathan* (3), *Bibijan Bibi* v. *Sachi Bewah* (4) and *Misri Lal* v. *Mittu Lal* (5), seem to favour the view that such payment after the order absolute is made by the mortgagor *qua* mortgagor in the exercise of the right to redeem, that is, that the right to redeem was still open after the passing of the order absolute for sale. But such a view must be held to have been erroneous since the Privy Council has definitely laid down in *Het Ram* v. *Shadi Ram* (6) what the proper interpretation of S. 89 of the Transfer of Property Act is. The language does not admit of doubt. Their Lordships say:—"The construction which their Lordships put on the language so used is that on the making of an order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree." This brings S. 89 into line with the clearer wording of S. 93 on this point. Therefore, any payment made by the mortgagor after the passing of the order absolute for sale is not a payment *qua* mortgagor in the exercise of the right to redeem, but a payment by a judgment-debtor to avert the sale, in the exercise of a right given him *qua* judgment-debtor, springing from and dependent on the execution of the decree by the mortgagee. Whether on such payment the Court could in execution restore the property to the mortgagor on the ground that the decree implied that the mortgagee could not have payment except on the condition of restoring the property is an open question which *Adipuranama Pillai* v. *Gopalaswami Mudali* (7) is inclined to answer in the

3. (1892) I L R 15 M 366.
4. (1904) I L R 31 C 863.
5. (1905) I L R 28 A 28.
6. (1918) I L R 40 A 407 at 410: 35 M L J 1 (P C).
7. (1907) I L R 31 M 354: 18 M L J 259.

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affirmative. In any case it is quite clear from the Privy Council dictum that under the old procedure both the security and the right to redeem were extinguished by the passing of the order absolute for sale and that the security, so far at least as the parties to the suit were concerned, was absorbed ino the decree and had no further existence outside it.

It follows, therefore, that the opportunity to redeem, given to the mortgagor under the old decree for sale just as under the old decree for foreclosure or redemption, might be lost for ever if the mortgagee obtained an order absolute under S. 87, 89 or 93. When under the decree or in execution of it the opportunity to redeem might in a certain contingency be lost for ever, it is difficult, almost impossible, to say that the right to redeem was not a matter in issue in the suit. It would not, of course, be lost unless the conditions which entailed its loss were fulfilled, but it was certainly a matter in issue— it was so vitally in issue, that proceedings in the suit might result in its being lost for ever. This is the sum and substance of the Full Bench decision.

Now all these sections of the Transfer of Property Act are gone and it is to be decided whether their disappearance involves the disappearance of the ground on which the former decision was based. Rules 2 and 3 of O. 34 of the Civil Procedure Code correspond to the old Ss. 86 and 87 of the Transfer of Property Act, Rr. 4 and 5 to Ss. 88 and 89 and Rr. 7 and 8 to Ss. 92 and 93; but the clause under S. 89 relating to the extinguishment of the security and the right to redeem has disappeared, and does not appear in R. 5, though similar clauses are retained in Rr. 3 and 8. I think, however, it is clear that it does not appear in R. 5 because it is not necessary. Under the old procedure the preliminary decree which allowed redemption remained the executable decree, and, therefore, the right to redeem was not extinguished *automatically* by the order absolute itself. So it was necessary to enact that on the passing of the order absolute it should disappear. Now the right to redeem embodied in the preliminary decree simply does not appear in the final decree which is now the executable decree. Therefore it disappears when the final decree is passed just as before it disappeared when the order absolute was passed. What was previously effected by direct statutory provision is now affected by procedure. But the contingency abovenoted still remains, namely, that when certain proceedings are taken in the suit after the preliminary decree for

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sale the right to redeem is extinguished. In my view therefore, the right to redeem is still vitally a matter in issue in the mortgage suit for sale. There is no essential change in the law which necessitates any inference that the principles laid down in the Full Bench case will not still apply. The final decree in its own terms makes it clear that the right to redeem is no longer enforceable under it, for it makes no provision for redemption. It cannot be that the adjudication on the right to redeem which was in issue in the suit and present in the preliminary decree somehow vanishes out of the suit upon the passing of the final decree. Before the final decree was passed, the mortgagor could not file a fresh suit for redemption because a suit is still pending in which the relief he seeks for is given him by the preliminary decree. He cannot by his own neglect attain a better position. I say "a better position" because obviously if he can in such circumstances file a fresh suit for redemption he can choose his own time to redeem and is not bound to redeem within the time fixed by the preliminary decree. It seems to me an irrational contention that says in effect that the passing of a final decree resuscitates a right—the right to file a fresh suit for redemption—which expired on the passing of the preliminary decree. The effect no doubt is to enable the mortgagee to force redemption on the mortgagor and to convert his decree for sale into one for foreclosure, but that again is no new factor introduced by the new procedure.

The only case in which any feature of novelty arises, is when a mortgagee is in possession and has obtained a final decree for sale, which has put an end to the mortgagor's right to redeem and will not proceed further to bring the property to sale. This is the case now before us and Mr. Venkatachari strongly urges that it puts the mortgagor in an unfair position, since he has under the final decree no power to compel the mortgagee to bring the property to sale. He urges that under the old procedure, where the executable decree was executable by the mortgagor as well as by the mortgagee, the mortgagor could pay up the decree amount at any time, until the property was actually sold. But in practice I see no real innovation. Under the old procedure, the mortgagor could pay up (*a*) within the time fixed in the decree, then he paid as mortgagor, (*b*) when the decree was being executed then he paid *qua* judgment-debtor. He could not, *qua* mortgagor, have the time fixed

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in the decree extended [see *Vallabha Valiya Raja* v. *Vedapurathi* (8), *Adipuranam Pillai* v. *Gopalaswami Mudali* (7)]. Therefore any payment after the time fixed, could only be in execution after the passing of the order absolute when the right to redeem was gone, and he paid only *qua* judgment-debtor. Such right was then equally as now, dormant unless and until the mortgagee took proceedings in execution. Thus the former right of paying up after the time fixed in the decree is the same and no other than the present right of paying up after the final decree, viz., the right *qua* judgment-debtor, to pay up, which right is in both cases contingent on the mortgagee proceeding to bring the property to sale and was not at any time exercisable independently of that contingency. There is no new hardship here, though there is no doubt some hardships, or at least some undue partiality by the law in favour of the mortgagee, who is in possession and elects to be content with having destroyed by a final decree his mortgagor's right to redeem and refuses to bring the property to sale under the final decree.

It may be that in view of this, Courts may be open to reconsider the position that the time granted for redemption in the preliminary decree for sale cannot be extended before the final decree (or order absolute) is passed. It is true that R. 5 of O. 34 does not contain a provision similar to that in Rr. 3 and 4 allowing the Court to extend the time for payment; but it is a power which may well be within the inherent powers of the Court, as in the case of preliminary decree for specific performance [see *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib* (9)] or it may be that a suit may lie on the decree to compel the mortgagee to bring the property to sale, in view of the fact that a mortgagee, who delays to bring the property to sale, is frustrating the fundamental principle of the mortgage contract, and of the right to redeem as defined in S. 60 of the Transfer of Property Act, both now merged in the final decree, that his ultimate claim is not to the property but to his money, and to the recovery of that money by sale of the mortgaged property. However, that may be, I am clear that the new procedure neither affects nor requires any change whatever from the old position, laid down in the Full Bench case, that the right to redeem was in issue in the

7. (1908) I L R 31 M 354: 18 M L J 259.
8. (1895) I L R 19 M 40: 5 M L J 282 (F B).
9. (1922) I L R 46 M 148: 44 M L J 107.

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mortgage suit for sale and is therefore *resjudicata* when a decree in that suit was obtained. It may be noted incidentally that two of the learned Judges in the Full Bench case were of opinion [*vide* their judgments in the Full Bench case *Mallikarjunadu Setti* v. *Lingamurthi Pantulu* (10).] that the order absolute for sale was a *decree*, in fact a final decree, and yet that view did not dissuade them from holding that the 2nd suit for redemption did not lie, even though in their view the first suit had only reached the stage of a preliminary decree, since no order absolute had been obtained. In the Full Bench case, the right to redeem had *not* been extinguished by any order absolute, and therefore subsisted. Nevertheless the Full Bench were unanimous that the right to redeem was merged in the decree and was *res judicata*. My conclusion on this part of the case, therefore, is that to follow the Full Bench ruling even under the new procedure will inflict no new hardship on the mortgagor.

I shall notice very briefly a few of the cases cited before us, dealing first with High Court cases and then with the Privy Council cases. The greater number are suits in which the first suit was for redemption and the second suit also for redemption, and either the decree in the first suit did not provide for foreclosure of the right to redeem, or, if it did, neither party had taken any steps to foreclose.Such decisions in Madras prior to the Full Bench case must be held to have been overruled, so far as they are inconsistent therewith for example, *Periandi* v. *Angappa* (11), which was however, not under the Transfer of Property Act, *Vallabha Valia Rajah* v. *Vedapuratti* (8) and *Ramunni* v. *Brahma Dattan* (12) which rejected the then Bombay doctrine of constructive forclosure by *res judicata* [see *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (13)], even when the decree in the first suit did not provide for foreclosure. The case *Maloji* v. *Sagaji* (14), though there the second suit was not for redemption but by a mortgagee for sale, also followed the *res judicata* principle, holding that the mortgage was merged in and could not be separated from the redemption decree obtained in the first suit. The Allahabad Court followed suit in

8. (1895) I L R 19 M 40: 5 M L J 282 (F B).
10. (1902) I L R 25 M 244: 12 M L J 279 (F B).
11. (1884) I L R 7 M 423.
12. (1892) I L R 15 M 366.
13. (1883) I L R 7 Bom 467.
14. (1888) I L R 13 Bom 567.

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*Devid Hay* v. *Hazi-ud-din* (15) and so did Bombay in *Bapuji Ramachandra* v. *Guja Malu Dhangar* (16), which, however, must be taken to have been overruled by the Full Bench of Bombay in *Ramji* v. *Bandharinath* (17) which has altered the previous view in Bombay. The Full Bench case in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) already mentioned is also a case in which both suits were for redemption. To come to cases in which the first suit was, as in the present case, a suit for sale and an order absolute for sale had been obtained but no further action had been taken, this High Court in *Ranga Aiyangar* v. *Narayanachariar* (18), where the first decree was obtained in 1872 prior to the passing of the Transfer of Property Act held that the second suit for redemption was barred. In *Rama* v. *Bhagchand* (19) the later Bombay view prevailed that the suit was not barred by *res judicata*. No previous case in India is discussed in that judgment and only one English case is cited. *Shaw Mehdi Hasan* v. *Ismail Hasan* (20) a case under the present Civil Procedure Code, adopted the Bombay view that the suit was not barred. An earlier Allahabad case reported in *Sham Sundar Lal* v. *Har Narayan* (21), takes the same view. So far as this Court goes then, the general principle of *res judicata* has been applied to the case where the first suit was a suit for sale.

Coming now to the Privy Council cases, the earliest is one of 1873, *Gokuldas* v. *Kriparam* (22). The first suit was by the mortgagee for sale. The decree in that case was a curious one which did not provide any opportunity to the mortgagor to come in and redeem, and in execution of which the mortgagee somehow got into possession. It was held that the mortgagor had never had his legal opportunity of redeeming and, therefore, a suit for redemption lay in the circumstances of the case. That is no authority in favour of the respondent. In *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (23) the question whether the mortgagor could, instead of suing for redemption on a decree for redemption, fall back on the original mortgage and claim to redeem it was not decided. In *Mahabir Pershad Singh* v. *Macnaghten* (24)

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1. (1902) I L R 25 M 300: 12 M L J 128.
15. (1897) I L R 19 A 202. 16. (1917) I L R 42 Bom 246.
17. (1918) I L R 43 Bom 334 (F B).
18. (1915) I L R 39 M 896: 30 M L J 13.
19. (1914) I L R 39 Bom 41. 20. (1920) I L R 42 A 517.
21. (1910) 9 I C 158. 22. (1873) 13 Beng L R 205 (P C).
23. (1886) I L R 10 Bom 416 (P C). 24. (1889) I L R 16 C 682 (P C).

Ellarayan v. Bangaswami Aiyar.

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Wallace, J.

where the mortgagee had got a decree for sale and the mortgagor sued to have the sale set aside and certain set-offs allowed, it was held that the second suit was barred by *res judicata*. The case is not much to the point here. In *Raja Papamma Rao* v. *Ramachandra Raju* (25) the decree passed on a simple mortgage did not suggest foreclosure or necessarily anything more than an usufructuary mortgage. The case is explained at page 335 of the Full Bench case in *Vedapurathi* v. *Vallabha Valiya Rajah* (1). It again is no authority in favour of the respondent. In *Faiyas Hussain Khan* v. *Bah Narain* (26) the first decree was in favour of the mortgagee for sale, and he had also got an order absolute for sale, and the plaintiff had in execution become the auction-purchaser. The second suit was by the auction-purchaser (defendant) in a suit on a second mortgage to redeem, the plaintiff's purchase being subsequent to the defendant's. It was held that the defendant could not resist the plaintiff's claim to possession. Incidentally it was laid down that an auction purchaser on foot of a second mortgage could have and ought to have redeemed before the sale under the first mortgage decree was confirmed and that his subsequent application to redeem was properly refused. There is nothing in any of these cases which runs counter to the general principles laid down in *Vedapurathi* v. *Vallabha Valiya Rajah* (1). In *Sukhi* v. *Ghulam Safdar Khan* (27) a prior mortgagee had obtained a decree for sale without joining a puisne mortgagee and the latter sued, and it was argued that the prior mortgagee could not use his mortgage as a shield, because the mortgage was merged in the decree for sale and was, therefore, extinguished. The Privy Council held that under the altered wording of the Transfer of Property Act and the Civil Procedure Code the mortgage was not extinguished and could be held up as a shield. I do not consider that this ruling is authority for the proposition that, when a mortgagee has obtained a decree for sale, the mortgage as between himself and his mortgagor and all parties to the suit is not merged in the decree in the suit. The decision merely declares that by the decree the security is not extinguished so far as to prevent the agitation of rights under it which were not decided by the

1. (1902) I L R 25 M 300: 12 M L J 128.
25. (1896) I L R 19 M 249: 6 M L J 53 (P C).
26. (1907) I L R 29 A 339: 17 M L J 263 (P C).
27. (1921) I L R 43 A 469: 42 M L J 15 (P C).

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decree. It does not touch the question agitating afresh rights already concluded by the decree.

The plaintiff's mortgage in the present case is *pendente lite* and his rights are, therefore, no higher than the rights of the mortgagor, and, as I have already said, the rights of redemption as between the mortgagor and the mortgagee have been once for all merged in the decree in the suit for sale. The principle involved is that in all suits on mortgage which are successful the mortgage, so far as parties to the suit are concerned, is merged in the decree and the mortgagor's rights are only exercisable under the decree and do not exist any longer outside the decree. The right to redeem, therefore, can be exercised only as provided under the decree and not outside the decree. It follows then that, after a decree in a mortgage suit, whatever the form of that decree, whether for foreclosure, sale or redemption, the parties to the mortgage and to the suit and their legal representatives or assignees cannot maintain in future any separate suit or any claim arising out of the mortgage [see *Ameenammal* v. *Meenakshi* (28)]. The proper test, I think, is, does the decree provide for every relief obtainable by the parties under the mortgage and leave none unprovided for? It appears to me that it does. It may be noted that the form of final decree, Form 10-A of Sch. I-D is the same in a suit for sale as in a suit for redemption, in the case of a simple or usufructuary mortgage when payment has not been made, and that sub-clause (3) in O. 34, R. 8 does not apply to sub-clause (4). In the case of a final decree for redemption under a simple or usufructuary mortgage it cannot be doubted that the right to redeem ceases with the passing of the decree. Why should it be deemed otherwise in the case of a final decree of exactly the same wording in a suit for sale?

The learned Judge from whose judgment this appeal is preferred has distinguished the case of *Ranga Aiyangar* v. *Narayanachariar* (18) by saying that, if the Judges there had been dealing with a decree unexecutable by a mortgagor, the decision would have been different. I do not think it follows. Under a preliminary decree it is as open to the mortgagor as to the mortgagee to obtain the final decree and the fact that the former's neglect results in a final decree which is not executa-

18. (1915) I L R 39 M 896: 30 M L J 13.
28. (1920) 12 L W 173.

Ellarayan v. Rangaswami Aiyar.

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ble by him cannot resuscitate the right to redeem which is gone. When the learned Judge holds that the right of the mortgagor to redeem property has not been taken away upon the passing of the final decree for sale, I must, for reasons I have already given, with respect differ from him. The learned Judge relies mainly on *Ramji* v. *Bandhari Nath* (17) which lays down that the right to redeem is not a matter in issue in a suit for sale. I have already given my opinion that, if the right to redeem can be foreclosed, as it can, in such a suit, it is very difficult to hold that it is not a matter in issue in the suit. I must, for reasons given above, hold that the learned Judge's decree should be reversed. I would reverse it and restore the decree of the Lower Appellate Court with costs to the defendant throughout.

Madhavan Nair, J.

*Madhavan Nair, J.* :—The defendant-appellant as usufructuary mortgagee with a personal covenant to pay sued in O. S. No. 430 of 1912 for the sale of the suit properties. A preliminary decree was passed in his favour on the 14th of October, 1913, in which time was fixed for payment till the 14th of November, 1914. A final decree was passed on the 25th of February, 1915. While this suit was pending, the mortgagor gave another mortgage of these properties to the plaintiff's father. In O. S. No. 289 of 1918 the plaintiff respondent obtained a decree for sale without making the defendant a party to the suit and purchased the property himself. He then instituted the present suit for the redemption of the mortgage in favour of the defendant.

The question for decision is whether the decree in O. S. No. 430 of 1912 operates as *res judicata* in the plaintiff-respondent's suit for redemption. Devadoss, J., reversing the concurrent judgments of the Lower Court, rejected the plea of *res judicata* and remanded the suit for disposal. This decision is the subject-matter of the Letters Patent Appeal.

In my opinion, this case must be decided by applying the principle of the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1). In that case a Full Bench of this Court held that, where a suit for redemption has been instituted and a decree for redemption had been passed therein but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. It is no doubt true that in the present case the decree in the

1. (1902) I L R 25 M 300: 12 M L J 128.

17. (1918) I L R 43 Bom 334 (F B).

Ellarayan v. Ranga-swami Aiyar.

Madhavan Nair J.

prior suit was one for the sale of the properties and not for redemption ; but if we have regard to the real nature of the decree for sale passed under Ss. 88 and 89 of the Transfer of Property Act, it will be found that this difference does not really make the decision inapplicable. It is not denied that the decree in O. S. No. 430 of 1912 gave the mortgagor who was the defendant in that suit a right to obtain possession of the suit property by paying the decree amount within the time fixed by the Court. In *Vedapurathi* v. *Vallabha Valiya Rajah* (1) Sir Bhashyam Aiyangar, J. states thus :— "Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each a conditional *decree for redemption* in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the day fixed."......"Decrees for specific performance, decrees respecting rights of easements and similar decrees are often made conditional, but they are none the less 'final judgments' having the force of *res judicata.*" The learned Chief Justice said, "The Legislature has laid down what is the 'matter in issue' in a redemption suit. In order to succeed the mortgagor has to show that he is entitled to a decree ordering that if he pays off the mortgage debt in pursuance of the order of the Court, the mortgagee shall re-transfer the property and if necessary put him in possession. The matter in issue is —aye or no— is the mortgagor entitled to the decree which, if he succeeds, the Court is required by S. 92 to make ?" The same matter is in issue in a mortgagee's suit for sale. The form of the decree shows that it contains a conditional decree for redemption. The right to redeem having been thus once adjudicated, the decision in which it was so done must operate as *res judicata* in a subsequent suit for redemption. It is true that even after the order absolute for sale under S. 89, it is open to the mortgagor to pay up the mortgage amount and thus aver the sale [see *Adipuranam Pillai* v. *Gopalaswami Mudali* (7)] ; but this does not mean that the right to redeem still survives. The payment is made by the mortgagor not under the Transfer of Property Act but in the capacity of a judgment-debtor under the provisions of the Code of Civil Procedure. The substantial right involved in the suit, *viz.*, the right to redemption being thus merged in the decree, though the decree is one for sale, the same right cannot again

1. (1902) I L R 25 M 300: 12 M L J 128.
7. (1908) I L R 31 M 354: 18 M L J 259.

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be put in issue in another suit. Applying the principle of the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) it was held by Sadasiva Aiyar and Napier, JJ. in *Ranga Aiyangar* v. *Narayanachariar* (18) that a subsequent suit instituted by the mortgagor for redemption of the mortgage was barred by *res judicata* by the decision in a prior suit for sale instituted by the mortgagee in which a decree had been passed containing a direction in favour of the mortgagor who was a defendant therein for recovery of possession of the property and which decree was not executed by either party.

The learned vakil for the respondent argues that the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) is inapplicable to the present case, also because of the alteration in the law regarding the nature of the decree to be passed in mortgage suits for sale of properties introduced by O. 34, Rr. 4 and 5 which repealed Ss. 88 and 89 of the Transfer of Property Act. By the repeal of the old sections of the Transfer of Property Act there are now two decrees in all mortgage suits—the preliminary decree and the final decree. The preliminary decree cannot be executed, the executable decree being the final one. It is argued by Mr. Venkatachariar that, since under the Code of 1908, the preliminary decree is now inexecutable, all that is stated in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) with reference to the operative character of such decrees become inapplicable to cases arising under the present Code. He also argues that since by the omission in O. 34, R. 5 of the words "and thereupon the defendant's rights to redeem and the security shall both be extinguished" which occurred at the end of the old S. 89, the relationship of the mortgagor and the mortgagee still subsits in spite of the final decree, it is open to the mortgagor to institute a second suit for redemption.

In my view, the non-executability of the decree and the alleged continuance of the relationship of the mortgagor and the mortgagee even after the passing of the final decree do not affect the application of the principle of the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) to the facts of the present case. The question that we have to decide is purely one of *res judicata*. A properly framed preliminary decree contains a direction enabling the mortgagor-defendant to pay the money declared to be due on the mortgage to the mortgagee within the prescribed period in which event the mortgagee shall deliver the property to the

1. (1902) I L R 25 M 300: 12 M L J 128.
18. (1915) I L R 39 M 896: 30 M L J 13.

Ellarayan v. Rangaswami Aiyar.

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mortgagor. By paying the amount prescribed in the preliminary decree it is open to the mortgagor to obtain a final decree. Since he did not do so in the present case, the right of redemtion which has become merged in the decree cannot be re-opened again in a subsequent suit. It may be observed that the learned Chief Justice in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) did not rest his judgment on the executability of the decree for he had on the same day delivered judgment in another Full Bench case [see *Mallikarjunadu Setti* v. *Lingamurthi Pantulu* (10)] in which he held that an order passed upon an application made under S. 89 of the Transfer of Property Act corresponding to O. 34, R. 5 of Act V of 1908 was not an order made in execution proceedings. Sir Bashyam Aiyangar also bases his judgment on principles of *res judicata* embodied in S. 11 of the Code of Civil Procedure though as a supplemental ground, the learned Judge states that the second suit is barred by the provisions of S. 244 also inasmuch as the applications under Ss. 89 and 93 were applications in execution. As regards the continuance of the relationship of the mortgagor and the mortgagee, it cannot be said, as has already been pointed out, that the payment which the mortgagor-defendant is entitled to make to avert the sale is made by him as a mortgagor. He pays only in the capacity of a judgment-debtor under the provisions of the Code of Civil Procedure. Whether on making such payment he is entitled to be put in possession of the property is a doubtful question which it is not necessary to decide in this case though the case in *Adipuranam Pillai* v. *Gopalaswami Mudali* (7) decides that he is so entitled.

In the course of his arguments, Mr. Venkatachariar referred particularly to three decisions, namely, *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (23), *Raja Papamma Rao* v. *Ramachandra Raju* (25) and *Gokaldas* v. *Kriparam* (22) in support of his contention that the second suit for redemption would lie. The first two cases have been explained by Sir V. Bhashyam Aiyangar, J. in *Vedapurathi* v. *Vallabha Valiya Rajah* (1). In *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (23), their Lordships of the Privy Council, though they cite the decision in *Periandi* v. *Angappa* (11) do not express any opinion on the question

1. (1902) I L R 25 M 300: 12 M L J 128.
7. (1908) I L R 31 M 354: 18 M L J 259.
10. (1900) I L R 25 M 244: 12 M L J 279 (F B). 11. (1884) I L R 7 M 423.
22. (1873) 13 Beng L R 205 (P C). 23. (1886) I L R 10 Bom 461 (P C).
25. (1896) I L R 19 M 249: 6 M L J 53 (P C).

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whether the plaintiff could fall back upon the original mortgage and the case therefore does not afford any help in answering the question whether a subsequent suit on the same mortgage is barred by S. 11 of the Code. The decision in *Raja Papamma Rao* v. *Ramachandra Raju* (25) really depended on the construction of the prior decree passed on the mortgage which contained the condition that "If the debt is not discharged according to the instalments, you should recover the same by means of the mortgaged property, the crops of our cultivation and our other property and from our person according to your wish." The learned Judges held that the prior decree in effect put the mortgagee in the position of the usufructuary mortgagee and therefore the mortgagee could be redeemed by a fresh suit. The decision in *Gokuldas* v. *Kriparam* (22) is also based on the construction of the prior decree passed in the case under which the mortgagee got into possession. It was held that as that decree did not extinguish the mortgagor's right of redemption, a suit by him for that purpose was not barred.

The decision in *Ramji* v. *Pandharinath* (17) took the view that a second suit for redemption would lie. Mr. Justice Devadoss has in effect followed that decision. The view of our own High Court in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) is different from that of the Bombay High Court. Mr. Venkatachariar has not been able to persuade me that the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) does not lay down the correct law. I do not think it is necessary to discuss the various other decisions referred to by him in the course of the argument, as they do not in my view directly bear on the question under consideration. In my opinion, the plaintiff's suit is barred by the operation of the doctrine of *res judicata*. I would therefore set aside the decision of the learned Judge and dismiss the plaintiff's suit with costs throughout.

T. S. V. *Appeal allowed and suit dismissed.*

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1. (1902) I L R 25 M 300: 12 M L J 128.
17. (1918) I L R 43 Bom 334. 22. (1873) 13 Beng L R 205 (P C).
25. (1896) I L R 19 M 249: 6 M L J 53 (P C).

## PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

Kunwar Chiranjit Singh ... *Appellant**

*v.*

Rai Bahadur Har Swarup, (deceased) represented by Gayan Swarup and others ... *Respondent.*

P. C.

Kunwar Chiranjit Singh *v.* Rai Bahadur Har Swarup.

*Contract of sale—Supersession of—Acceptance of earnest money and portion of price contrary to terms of contract if a—Breach of contract by vendee—Earnest money—Amount paid towards price—Vendee's right to recover.*

The plaintiff-appellant entered into a contract with the defendant for the purchase of an estate belonging to the latter. One of the terms of the contract of sale was as follows:—

28th July, 1914, from defendant to the plaintiff :—

"Willing on old terms, namely, earnest 20,000 balance in two moieties, first payable on executing conveyance, last within six months net cash we receive 4 lakhs and 76,000."

On the 2nd August a reply was sent accepting the proposal.

The plaintiff did not pay the earnest money *eo nomine*, but on 28th August, 1914, he sent two cheques, amounting *in cumulo* to Rs. 1,65,000, the receipt being granted for these sums "towards the sale price of the Markham Grant Estate" (the estate contracted to be sold) "out of the consideration of Rs. 4,76,000."

Then, on 6th September, 1914, the plaintiff wrote to the defendant to say that he was unable to purchase the estate, and that the defendant was at liberty to sell it to another.

In a suit brought by the plaintiff to recover the sum of Rs. 1,65,000 paid by him to the defendant, *held,* (1) that there was a complete contract of sale, and (2) that the plaintiff, having broken the contract, lost his earnest money of Rs. 20,000, but was entitled to recover Rs. 1,45,000 the balance of his payment to account.

Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

*Held,* that the acceptance of Rs. 1,65,000 by the defendant and the grant of a receipt by him stating that it was towards the sale price did not amount to a supersession of the former contract.

It was merely a financial modification in the interests of the purchaser, who appeared to be unable or unwilling fully to meet the terms of the contract.

Appeal from a judgment and decree of the Allahabad High Court reversing a decree of the Subordinate Judge's Court.

*A. M. Dunne, K. C.* and *B. Dube* for appellant.

*De Gruyther, K. C.* and *J. M. Parikh* for respondent.

1st December, 1925. The Judgment of the Board was delivered by

*P C Appeal No. 80 of 1923. 1st December, 1925.

P. C.

Kunwar Chiranjit Singh
*v.*
Rai Bahadur Har Swarup

Lord Shaw.

LORD SHAW:—The main appeal has reference to a contract of sale of the Markham Grant Estate belonging to the defendant Jyotish Sarup. The contract was entered into with the plaintiff-appellant. The High Court, reversing the judgment of the Subordinate Judge, held that there was a complete contract of sale. In the opinion of the Board the High Court, in this particular, as in the others aftermentioned, was right.

One of the terms of this contract of sale was as follows :—

28th July, 1914, from defendant to the plaintiff:—

"Willing on old terms, namely, earnest 20,000 balance in two moieties, first payable on executing conveyance, last within six months net cash we receive 4 lakhs and 76,000."

On the 2nd August a reply was sent accepting the proposal. From that point forward, however, the appellant appears to have encountered financial difficulties in carrying out the contract. He set about endeavouring to secure the property on modified and easier terms. He did not pay the earnest money *eo nomine,* but on the 28th August, 1914, he sent two cheques, amounting *in cumulo* to Rs. 1,65,000, the receipt being granted for these sums "towards the sale price of the Markham Grant Estate out of the consideration of Rs. 4,76,000."

It is contended that this formed a supersession of the former contract. The Board agrees with the opinion of the High Court that this is not so. It was merely a financial modification in the interests of the purchaser, who appeared to be unable or unwilling fully to meet the terms of the contract.

Then came, on 6th September, 1914, a letter from the purchaser's representative in these terms:—

"In continuation of my telegram, dated the 3rd instant from Simla, I have to inform you that, owing to certain unavoidable circumstances Kunwar Chiranjit Singh of Kapurthala, is quite unable to purchase the Markham Grant Estate in the Dehra Dun district. You are hence quite at liberty to settle your terms and make up the bargain with any other purchaser."

It is accordingly plain that the purchaser was unable or unwilling to complete the contract, even in its modified terms. According to the judgment of the High Court, which again, in their Lordships' view, is correct, the purchaser must, having broken the contract, lose his earnest money of Rs. 20,000 but must be repaid Rs. 1,45,000, the balance of his payment to account. The appeal is brought with the object of his also obtaining repayment of the earnest money.

P C.
Kunwar Chiranjit, Singh
v.
Rai Bahadur Har Swarup.
Lord Shaw

In the opinion of the Board, as mentioned, the original contract of sale was not superseded. It was carried forward with the modifications alluded to and in particular there is nothing to suggest that the owner of the Estate agreed to sacrifice the stipulated earnest.

Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

The application of this principle to the contract in question settles the case.

A cross-appeal was presented truly for the purpose of endeavouring to meet circumstances which have not arisen, namely, the Board's possibly coming to an opinion that the original contract of sale had been wiped out.

Their Lordships will humbly advise His Majesty that the main appeal fails with costs. As to the cross-appeal there will be no order except that there be no costs to either side.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondent : *T. L. Wilson and Co.*

A. de M. *Appeal dismissed.*

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## PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Patna.)

PRESENT:—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESAN.

Maharaj Bahadur Singh ... *Appellant**

*v.*

Seth Hukum Chand and others ... *Respondents.*

P. C.
Maharaj Bahadur Singh
v.
Seth Hukum Chand

*Religious Endowment—Jain religious community—Buildings long ago dedicated to common use of two sections of—Improvement subsequent of, by one of sections—Effect—Exclusive right in that section not created thereby—Sites dedicated to religion of Jains generally—Appropriation of, by one of sections—Evidence—Building erected thereon by that section without interference—Effect of, after long lapse of time—Concurrent findings of fact—Rule as to.*

Ancient buildings already dedicated to the common use of both sections of the Jain religious community were found subsequently to have been rebuilt or largely improved by the Swetambaras, the richer of the two sections. *Held,* that that contribution to the common religious buildings could create no exclusive right in the Swetambaras.

It is possible for one of the sections of the Jain religious community to appropriate sites dedicated to the religion of the Jains, generally; and the fact that that section without interference built upon them is after a long lapse of time sufficient evidence of appropriation.

Usual rule of accepting concurrent conclusions of fact adhered to.

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*P C Appeal No. 36 of 1924. 4th December, 1925.

P. C.

Maharaj Bahadur Singh v. Seth Hukum Chand

Lord Phillimore.

*L. DeGruyther, K. C., G. R. Lowndes, K. C.* and *B. Dube* for appellant.

*A. M. Dunne, K. C., E. B. Raikes* and *Champat Rai Jain* for respondents.

4th December, 1925. The Judgment of the Board was delivered by

LORD PHILLIMORE:—The circumstances which have given rise to these consolidated appeals from the High Court at Patna are briefly as follows:—

The professors of the Jain religion have been for a very long period divided into two sections, the Swetambara (white-clothed) and the Digambara (clothed with the sky—an expression for the unclothed).

The division is so ancient that it is apparently uncertain whether it took place some little time before or some little time after the Christian era. There is some suggestion in the papers before their Lordships that there are certain differences of doctrine, but the division is principally in matters of ritual and worship. Broadly speaking, the Swetambara after washing the sacred images, clothe them and decorate them before worship, while the Digambara remove all covering before they worship; and the ritual which is applied to the images, is also applied to certain sacred footprints.

The Jains recognise 24 highly saintly personages—men who have attained salvation or Nirvana, who are called Tirthankars (finders of the ford, across the river of death). These four and twenty are counted in many respects as higher than the gods or some of the gods in the Hindu Pantheon.

Twenty of them are believed to have attained Nirvana in the present cycle of the world's history upon the Hill Parasnath in the district of Hazaribagh in Bengal, with the result that the hill is held in reverance by Jains. The hill itself has some remarkable natural features, and rises into several peaks. Twenty spots apparently marked out by natural features, are believed to be places from which the 20 Tirthankars quitted earth; and at each of these spots, a footprint of the Saint is worshipped. There is a small enclosure covered with a cupola, which at the present moment is made of white marble. These spots have been set apart from remote antiquity. The four remaining Tirthankars quitted earth in other parts of India. In respect of them conventional spots have been since the year 1868 set apart and treated in a similar way.

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Upon the hill there are also a shrine to a lesser Saint called Gautama Swami, an important temple in one of the highest parts of the mountain—called Jalmandil, certain platforms set apart for religious contemplation and two Dharamsalas or rest-houses for pilgrims. The hill is much frequented by pilgrims, who take the 24 shrines or tonks in regular order, worshipping at each.

According to the tenets of the Digambara, this worship must be performed fasting, and the whole hill is so sacred that from the moment they set foot on it, they must abstain from any office of nature, even spitting. The Swetambara do not so limit themselves.

For many years the Rajah of Palgunj, in whose Zamindari the hill is appears to have managed and kept in repair the temples and tonks and to have taken the offerings from the pilgrims. But in 1872 the Swetambara made an agreement with the Rajah for an annual payment, and proceeded to take the offerings for themselves and to manage and keep in repair the sacred places.

As time went on, differences in respect of their different mode of worship and the confusion resulting from different sets of pilgrims desiring to carry out their own ritual led to disputes between the two sections; and proceedings were taken to have a "record of rights" under the Chhota Nagpur Tenancy Act of 1908 established. A Record of Rights was framed by the proper officer, and a table was drawn up in which the whole hill was described as "private unculturable land," and then 48 items described as house, temple, tonk or platform, were enumerated, and the following description was added :

> "Temple and dharamsala referred to in this Khata in which all the Jains have the right to stay and to make Puja (worship) without the permission or opposition on the part of any person."

Whether the words "temple" and "dharamsala" referred only to the first two items, or whether it was intended that the description should apply to all the 48 does not clearly appear. But whichever is the true construction, it was considered by the Swetambara to be unfavourable to them, and accordingly the present suit was instituted on their behalf impeaching the record and claiming.

> "(*b*) That it be declared that the defendants as also the whole Digambari sect of Jains have no right to worship in the temples on the Pareshnath Hill in Gadi Palgunj, Sub-District Giridih, District Hazaribagh, without per-

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mission of the Swetambari sect of Jains and in a mode not approved by them and that they cannot occupy the dharamsalas on the said Hill without similar permission.

"(c) That an order be passed directing the correction of the entry in the Khas Khatian of Khewat No. 7 to the effect that the Digambari sect of Jains can worship in the temples on the Pareshnath Hill only with the permission of the Sitambari Jains and in a mode approved by them and can occupy the dharamsalas only with their permission."

When the case came on for trial, it was found that there were 31 edifices in dispute. Of these 5 (Numbers 26 to 30), which were structures or platforms for purposes of contemplation, were admitted to be exclusively devoted to the Swetambaras. In respect of the 20 tonks dedicated to or commemorating the 20 Tirthankars who found Nirvana from the hill, and the shrine of Gautama Swami, the Subordinate Judge found that both sections of Jains had an equal right of worship; while with regard to the remaining 4 tonks and the Jalmandil temple, he found that the Digambaras had no right to worship and could only do so with the permission of the Swetambaras; and as to the Dharamsalas he decided that they belonged to the Swetambaras, and that the Digambaras could not use them except by permission.

He appended to his finding an observation about the "usual practice" as to which their Lordships will make a separate reference subsequently.

Appeal and cross-appeal were brought from this decision, but it was affirmed. And both parties have now appealed to His Majesty in Council.

Much of the case turns upon disputed questions of fact; and upon all the important questions of fact subject to one reservation, both Courts have come to the same conclusion, while nothing has been brought to their Lordships' notice which would induce them to depart from their usual rule of accepting concurrent conclusions of fact.

Taking now the case of the 20 tonks and the shrine of Gautama Swami, it is clear that they are of ancient date, and that the holiness of the sites may go back to a time anterior to the division into Swetambaras and Digambaras.

No doubt the Swetambaras being the richer sect have rebuilt or largely improved the present buildings. But if the ancient buildings were already dedicated to the common use of both sections, this contribution to the common religious buildings can create no exclusive right. Upon this short ground their Lordships think that the decision should stand.

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Now as regards the 4 tonks commemorating the Tirthankars who attained Nirvana from different places in India. As to these there is no ancient appropriation of site. They were marked out and built upon by members of the Swetambara section as late as 1868. No doubt Digambaras as well as Swetambaras have worshipped in them; but their Lordships agree with the Courts below that there is no evidence that they worshipped in them as of right. They may well have done so by permission of the Swetambaras, and there is nothing in the papers to show that this permission will not continue to be given, subject to such conditions as the prior claim of the Swetambaras may demand.

It was urged before their Lordships that there was no legal appropriation of the site of these tonks; but counsel for the Digambaras, while urging this argument, requested their Lordships to decide no question of title with regard to the ownership of the hill, stating that there was a suit pending in India which involved this question.

Confining themselves therefore to what appears in the papers in the present case, their Lordships would gather that at any rate there was no title in the Digambaras which could prevent the Swetambaras from lawfully acquiring possession of the 4 sites.

If the title be in the Rajah, there is quite sufficient evidence of a grant by him for this purpose.

The only conflicting suggestion was that in some manner the whole hill had become vested in the whole Jain religious community or was held by the Rajah in trust for that purpose.

Their Lordships neither affirm or disaffirm this contention; but if it were proved, it would not in their opinion affect this case.

The hill is said to be of an area of about 25 square miles, rough, and as stated in the record of rights, "unculturable."

Supposing it to be dedicated to the religion of the Jains, generally, it was still possible for the Swetambaras to appropriate these four sites, and the fact that they without interference built upon them is at this lapse of time sufficient evidence of appropriation.

There remains for consideration the temple of Jalmandil. As to this it is admitted that in the central chamber the images or idols are those of the Swetambaras, and that two of the four

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side chambers are used to contain some of their paraphernalia of worship. The Swetambaras say that the other two chambers either are empty or are used as lumber rooms.

The Digambaras say that their images were there and were worshipped there and have been improperly removed by the Swetambaras.

It seems certain that the images were not there at the time when the settlement officer made the inquiry with a view to the record of rights; and the view of the Subordinate Judge was that no consecrated images had ever been there.

The High Court thought that the evidence of the one witness of respectability who said that he worshipped Digambara images in one of these rooms in 1909, was worthy of credit, and that possibly the evidence might be reconciled by supposing that some of the Digambara images had been stored there for a time.

This is the only substantial point on which the two Courts differed; but the Judges of the High Court thought that such user as they found, which might well have been permissive, gave no title to the Digambaras; and it is enough for their Lordships to say that they agree in this conclusion.

As to the Dharamsalas, the Digambaras owing to their special ascetic tenets have not found and will not find much need to use them. At the time when they were built, the sites had not been specially consecrated or otherwise appropriated. They were built by the Swetambaras, and both Courts have found that such user as the Digambaras have had of them was by permission of the Swetambaras. On the question of title, their Lordships need only refer to what they have said with regard to the 4 tonks. In this respect as in the others, the cross-appeal fails.

Before parting with the appeal their Lordships have a further observation to make.

When the learned Subordinate Judge was dealing with the history of the case, he laid considerable stress upon the fact that, possibly for reasons connected with their ascetic rules, the Digambara pilgrims usually began their cycle of visitation of the tonks earlier in the day than the Swetambaras, so that the covering and adornments put by the Swetambaras would usually remain untouched till the following morning. And he finished his judgment by saying :

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"I find so far as the 20 tonks are concerned, one sect has no right to restrict the others as to its mode of worship, provided the usual practice referred to above is observed."

In his actual decree he made no reference to this proviso. He was subsequently prayed to amend his decree by inserting this proviso, and he refused.

The Judges in the High Court agreed with this decision. Indeed, they thought that the practice had not been as uniform as it appeared to the Subordinate Judge to have been.

Before their Lordships great stress was laid by counsel for the Swetambaras upon the necessity of either inserting this proviso or making some regulation limiting the hours during which the Digambaras might worship.

Their Lordships find themselves unable upon the materials before them, to comply with this request.

Nor do they think it necessary, as it was urged in the alternative, to remit the case to the High Court, with directions to make some such regulation.

If after or in the working out of this judgment, there should be collision between the worship of the two sections in the 20 tonks, or any difficulty should unhappily occur in the conduct of orderly worship, such a matter could be regulated by competent local authority.

Their Lordships will humbly recommend His Majesty that the appeal and cross-appeal should be dismissed with costs.

Solicitor for appellant : *H. S. L. Polak*.

Solicitors for respondents : *W. W. Box and Co.*

A. de M. *Appeal dismissed.*

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## PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Lahore.)

PRESENT :—VISCOUNT FINLAY, SIR JOHN EDGE, MR. AMEER ALI AND MR. JUSTICE DUFF.

Ahmad Khan and others ... *Appellants**

*v.*

Musammat Channi Bibi ... *Respondent.*

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*Custom—Inheritance—Punjab agricultural tribes—Khattar tribe—Females—Exclusion of—Self-acquired property of father or brother—Exclusion of females from—Custom against—Proof of—Evidence—General evidence of its existence by members of family or tribe—Admissibility—Absence of proof of specific instances—Effect—Self-acquired property within meaning of custom—What*

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*amounts to—Finding of fact—Interference with—Grounds—Inadmissible evidence—Admission of—Such evidence forming only one item in mass of evidence—Effect.*

The appeal arose out of a suit brought by the respondent to establish her title in respect of certain lands belonging to one *A*, deceased. The respondent was the sister of *A*, and the defendants-appellants were his collaterals. The parties belonged to one of the agricultural tribes of the Punjab, called the Khattar.

The plaintiff whilst admitting the existence in her tribe of a custom under which a daughter or a sister was excluded in favour of collaterals from inheritance in respect of "ancestral" property, denied its application to "self-acquired property." She stated that there was no special or general custom prevailing in the Khattar tribe under which collaterals deprived a daughter or a sister of the right of succession to property acquired by the father or brother. The defendants pleaded that by the custom prevailing in the tribe or in the family, females were excluded from succession irrespective of the character of the property whether it was ancestral or self-acquired.

The two points for decision were (1) whether property called Surag Salar constituted "self-acquired property" within the meaning of the custom alleged and (2) whether the custom alleged by the plaintiff had been proved.

*Held*, on the evidence, affirming the Court below, (1) that the custom alleged by the plaintiff had been proved, and (2) that Surag Salar was "self-acquired property" within the meaning of the custom.

As regards the custom the Sub-Judge put aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. *Held*, that he erred in doing so, and the High Court was right in holding that a custom of the kind alleged in the case might be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.

*Held also*, that the finding of the High Court in favour of the custom could not be interfered with on the ground that a piece of inadmissible evidence was admitted by it, as it formed only one item in the mass of evidence relied upon in support of the custom.

Appeal from a decree of the High Court (Abdul Raoof and Abdul Qadir, JJ.) in Civil Appeal No. 2741 of 1917, dated 25th May, 1922, reversing in part a decree of the Subordinate Judge of Attock at Campbellpur.

*L. De Gruyther* and *E. B. Raikes* for appellants.

*A. Majid* for respondent.

28th July, 1925. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI :—This appeal arises out of a suit brought by the respondent Musammat Channi Bibi in the Court of the District Judge at Attock, for the establishment of her title in respect of certain lands which she claimed by right of succession to her deceased brother Ali Waris Khan.

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The following table will show the relationship of the parties in these proceedings :—

- Zulfikar Khan.
  - Married to Mst. Sataro=Mahmud Khan—married to Mst. Gohar Bano.
    - (by Mst. Sataro)
      - Ahmad Khan=Mst. Sahib Jan.
      - Amir Khan.
        - Fateh Khan.
          - Ahmed Khan, defendant 1.
        - Bahadur Khan.
          - Sher Khan=Mst. Feroze Jan, defendant 2.
          - Nadu Khan, defendant 3.
        - Nawab Khan.
          - Lal Khan, defendant 4.
          - Dost Muhammad, defendant 5.
          - Jahan Dad, defendant 6.
          - Benaras Khan defendant 7.
      - Mohamed Khan *d.* 1902.
        - Mst. Ilahi Khanam. *d.* 1915 (with Jahan Khan)
          - Ali Waris Khan, d.s.p. *d.* 1904 In dispute.
          - Mst. Chanani, plaintiff
        - Mst. Nur Jehan d. s. p.
    - (by Mst. Gohar Bano)
      - Khan Mulak.
        - Mehar Khan.
          - Jahan Khan=Mst. Nur Bhari, defendant 8.
          - Nawab Khan
            - Khan Mulak defendant 9.
            - Jahan Dad defendant 10.
      - Baland Khan.
        - Karam Khan=Mst. Nur Khanum, defendant 17.
          - Aslam Khan = Mst Chanani, plaintiff.
      - Hidayat Khan.
        - Ali Mardan Khan
          - Sultan Khan, 3 S. P.
          - Jafar Khan defendant 11.
        - Abbas Khan.
          - Muhammad Khan. defendant 12.
          - Khusal Khan defendant 13.
          - Fateh Khan. defendant 14.
        - Khushal Khan.
          - Ghulam Muhammad,
            - Allayar Khan, defendant 15.
            - Khali Khan, defendant 16.
            - Aulia Khan, d.s.p.

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Both trace their descent from one Zulfikar Khan through his son Mahmud Khan. Mahmud had two wives, named respectively Sataro and Gohar Bano. By Sataro he had three sons, respectively named Ahmad Khan, Amir Khan and Mohamed Khan. By Gohar Bano he had also three sons named Khan Mulak, Baland Khan and Hidayat Khan.

It is in evidence that Mohamed Khan died in 1902, leaving him surviving two widows Musammat Ilahi Khanam and Musammat Nur Jehan. The latter died in 1905. By Ilahi Khanam, who lived until 1915, Mohamed Khan had a son, Ali Waris and a daughter, the plaintiff in this case. Ali Waris died in 1904; and the litigation relates to his inheritance.

The defendants are the descendants of the brothers and half-brothers of Mohamed Khan.

The parties belong to one of the agricultural tribes of the Punjab, called the Khattar.

The plaintiff whilst admitting the existence in her tribe of a custom under which a daughter or a sister is excluded in favour of collaterals from inheritance in respect of "ancestral" property, denies its application to "self-acquired property."

She states that there is no special or general custom prevailing in the Khattar tribe under which collaterals like the defendants deprive a daughter or a sister of the right of succession to property acquired by the father or brother.

The defendants plead that by the custom prevailing in the tribe or in the family, females are excluded from succession irrespective of the character of the property whether it was ancestral or self-acquired. The parties went to trial on that issue.

There are two properties in dispute, one called Surag Salar, the other Kharala. The Senior Sub-Judge of Attock before whom the case came for trial, found as a fact that Surag Salar was "self-acquired property" within the meaning of the custom alleged by the plaintiff, and that Kharala, save and except 416 Kanals of land, was "ancestral". But as regards the plaintiff's claim he held that she had failed for absence of specific instances to establish satisfactorily the custom under which she claimed her brother's inheritance. He accordingly dismissed her suit in respect of both the properties.

The High Court of Lahore, on the plaintiff's appeal, have given her a decree in respect of Surag Salar and the

416 Kanals of Kharala which appears to have been admittedly purchased by Mohamed Khan, and dismissed her suit regarding the ancestral village of Kharala.

The appeal to this Board is by the defendants, the collaterals, who claimed the succession of Ali Waris in preference to Channi Bibi, the sister.

The two points that have been raised before their Lordships really form the kernel of the case :

The first is : does Surag Salar, as has been found by the Courts in India, constitute in fact "self-acquired property" within the meaning of the custom alleged ?

The question whether Surag Salar was the "self-acquired" property of the plaintiff's father turns upon the construction of the revenue settlement which began in 1852 and was completed in the year 1863. The settlement was in fact made with Amir Khan and Baland Khan representing the two branches of Mahmud Khan's family.

The settlement papers make it perfectly clear that prior to the settlement of 1863, the family of Mahmud Khan had no right in Surag Salar. That about the close of the Sikh rule his sons had forcibly ousted another family that had been settled at Surag Salar for over 40 years. As already stated they had no title in the property; they had installed themselves thereby force and on the establishment of British rule in the Punjab, when settlement proceedings were begun they applied for settlement with them on the strength of certain advances or payments they had made to the Sikh Government. The settlement proceedings lasted several years and concluded only in 1863.

In the course of the proceedings a thorough inquiry was made as to title and possession. In the Punjab the Settlement Officer in the early days of British Rule combined in his person both judicial and administrative functions. He had to investigate into the actual conditions of the occupation of lands in respect of which the settlement proceedings were instituted and to give effect to ascertained facts in accordance with the result of his enquiry whether the occupation was by virtue of any right or title. There can hardly be any dispute that whilst the settlement proceedings were proceeding Mahmud Khan had died, for the settlement was made with his sons.

Before the settlement officer there were two parties arrayed against each other as claimants to the property of Surag Salar. Ghazan Khan represented the family which had been in possession of Surag Salar for over 40 years. They were

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placed in the category of plaintiffs ; whilst Amir Khan and Baland Khan representing the family of Mahmud Khan were the defendants. Both belonged to the tribe of Khattar.

It is not necessary in this judgment to refer in detail to the proceedings which culminated in the settlement ; it is enough to state the result of the enquiry embodied in Robakar Ex. F-7. It runs thus :—

"There is no doubt that the village originally belonged to the plaintiffs. The defendants' possession is of 22 years' standing. The defendants suffered a loss of thousands of rupees. If they had not made the village abad, it would have been totally ruined. Now the point for determination is whether the plaintiff's suit is entertainable or not owing to their ejectment which took place 22 years ago. So it is clear that the plaintiff's suit has been pending since 1852, *i. e.*, for the last 11 years. In other words, the defendants' possession is considered to have existed since 11 years before the institution of the suit. The period is a period during which such a suit is cognizable. It is less than 12 years. Under these circumstances the plaintiff's suit is cognizable. The plaintiffs are original proprietors of the village. As a matter of fact, the defendants have no concern with the inheritance. The plea of the defendants that they purchased the village is worthless. They produce a sale-deed which is also worthless because they previously made no mention of the sale, nor is there any proof in respect thereof nor yet as to their possession before Sambat, 1898. The plaintiffs were continuously in proprietary possession before the said Sambat. The opinion of Munshi Hukam Chand, Extra Assistant Commissioner, is that either Rs. 10 per cent. should be fixed for the plaintiffs as taluqdari dues or the village held the parties' property in equal half shares."

* * * * * *

"It is therefore ordered that the cultivated land of one-half of the village be considered as the property of plaintiff No. 1 and that of the other half as the property of the defendants. The objection raised by plaintiff No. 2 as to two wells that they were separately sunk by the plaintiffs and that they should be given to them or to plaintiff No. 1 is worthless, because if the defendants had not made them abad, while they were in possession (of the village) they would have totally been ruined and useless. They are in working order. They should, therefore, remain the property of plaintiff No. 1 and the defendants in equal half shares."

Again, the proceedings before the Court of the Settlement Officer (Ex. P-8) are instructive :—

"The plaintiff's ancestors again made the village abad after it had become desolate. They are, therefore, considered owners. Only the defendants' possession, which is of 20 years' standing, is to be taken into consideration. But it is not worth consideration because the plaintiff's suit has been pending since the beginning of the British rule. An appeal was filed therein in the Commissioner's Court which remanded the case to the District Court for further enquiry which was made in this case. Under these circumstances, the ejectment for 12 years during the British rule is not worth consideration, because if a complete enquiry had been made at that time, the plaintiffs would have got their right. The defendants' possession is considered to have existed since 8 years before the British rule. The Extra Assistant Commissioner has two proposals to me. One of them is that the plaintiffs should get Rs. 10 per

cent. as taluqdari dues. Under the above circumstances I consider the plaintiff's right to be superior thinking that the defendants had been in actual possession since 8 years before the British rule. The other proposal of the Extra Assistant Commissioner is that in view of the fact that the defendants shared profit and loss, the village should be given to both the parties in equal half shares."

The final decision of the Settlement Officer concerning the half share settled with Mahmud's family is contained in Ex. D-39, as follows :—

"The proprietors descended from Zulfikar Khan and Fateh Khan will collect the produce of the entire land, cultivated by them and by the tenants distribute it among themselves according to the shares shown in the Khewat papers, and pay the Government revenue according to ancestral shares in addition to Rs. 17 per cent. on account of cesses as under."

In their Lordships' judgment, the Settlement Officer having regard to the conflicting claims of the plaintiffs on one side and of the defendants on the other, made an equitable division of the property between the two sets of claimants. The plaintiffs (Ghazan's people) had the original title by long occupation ; the defendants had ousted them to a considerable extent and had undertaken some liabilities in respect of the payment of revenue, etc. The Settlement Officer, therefore, came to the conclusion that it would be equitable to settle half of the lands with the descendants of Khazan Khan who were the plaintiffs in the proceedings, and give the other half to the descendants of Zulfikar Khan. Surag Salar was thus in no sense ancestral property—it had not been acquired by their ancestor Zulfikar or Mahmud Khan and handed down to their successors. The settlement was effected in fact with Amir Khan and Baland Khan as representing the family of Zulfikar Khan and the title of proprietors was declared to be with them for the family. The direction contained in document D. 39, page 180, shows the character of the settlement with the defendants' family.

Their Lordships are clearly of opinion that the judgment of the Subordinate Judge and of the learned Judges of the High Court with regard to Surag Salar is right.

As regards the custom in respect of which the two Courts in India have differed, their Lordships think the Subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family

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who would naturally be cognisant of its existence and its exercise without controversy.

There is a large body of oral evidence establishing the custom, wholly unrebutted by the defendants who have relied exclusively on the *Riwaj-i-Aam*. The Judges of the High Court have commented on these documents, and their Lordships see no reason to differ from them.

The Judges of the High Court have referred to the evidence of Sirdar Mohammed Hyat Khan, a distinguished officer of the Government, which if admissible would be conclusive in the case; but it is urged by the appellants' counsel that it cannot be put in evidence as it is not in compliance with the requirements of the Indian Evidence Act I of 1872. Their Lordships are not prepared to say that in the circumstances of the case it was erroneously admitted but assuming it is inadmissible it forms only one item in the mass of evidence on which the plaintiff relied and which has been thoroughly examined by the High Court.

On the whole their Lordships are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellants will pay to the respondent the costs.

Solicitors for appellants : *Rankan, Ford* and *Chester*.

Solicitors for respondent : *Francis* and *Harker*.

A. de M. *Appeal dismissed*.

## PRIVY COUNCIL.

(On Appeal from the Chief Court of Lower Burma.)

PRESENT :—VISCOUNT FINLAY, SIR JOHN EDGE, MR. AMEER ALI AND MR. DUFF.

Ma Chit Su ... *Appellant**

*v.*

The National Bank of India, Limited, and another ... *Respondents*.

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*Specific performance—Contract to sell property—Completed agreement or not—Condition that litigation relating to property should be settled before agreement could take effect—What amounts to—Litigation affecting property within meaning of condition—Vendor if can refuse specific performance on ground of —Administrator—Contract by, as such—Administration suit—Preliminary decree in—Form of—Administration suit in competent Court—Power of another Court to authorise sale of property before such Court.*

The appeal arose out of a suit brought by the National Bank of India, Ltd., against *M* and the Bank of Bengal for specific performance of a contract to sell immoveable property in Rangoon. The appellant, the mother of *M*, was on her own application brought on the record as a defendant. The Trial Judge gave

*P C Appeal No. 123 of 1924. 23rd July, 1925.

the plaintiff a decree for specific performance. From that decree the appellant appealed, but the Appellate Court dismissed her appeal. From that decree of the Appellate Court the appellant appealed to the Privy Council. The questions in the appeal were, (1) whether there was a completed agreement for the sale of the property; (2) whether the alleged agreement to sell the property was ont subject to a condition that any litigation relating to the property should be settled before the agreement could take effect; and (3) whether the agreement to sell was within the scope of the authority of *M*.

The suit property originally belonged to *M*'s father and his (father's) brother jointly. The father died leaving his wife, the appellant, and nine children surviving him. On 17th March, 1907. letters of administration were, on the application of the appellant, granted by the District Court of Amherst under the Probate and Administration Act, 1881, to *M* to administer the estate of his father. As such administrator *M* became exclusively entitled to the suit property by 27th November, 1913.

Early in 1914 an administration suit was instituted in the Chief Court of Lower Burma by the appellant on her own behalf and on behalf of her eight younger children against *M* and others for the administration by the Court of the estate which was in his hands. *M* was then the administrator who had been appointed by the District Court of Amherst. On 22nd November, 1916, the Chief Court in the administration suit ordered that certain accounts should be taken and certain inquiries made, and that the suit should stand adjourned for making a final decree until the accounts and inquiries had been taken and made. The Chief Court had not, however, been asked to appoint a Receiver or to issue an injunction to *M* not to continue to act as an administrator under his appointment as an administrator by the District Judge of Amherst.

On 27th April, 1917, *M* applied to the Court of the District Judge of Amherst, under S 90 of the Probate and Administration Act, for permission to sell the suit property, and that Court granted him permission on 26th June, 1917.

On 9th July, 1918, the National Bank of India, Ltd., offered to purchase the suit property from *M* "subject to a clear title". On the 10th July, 1918, *M* agreed to sell "subject to settlement being effected of any litigation relating to the same properties."

The plaintiff bank subsequently sent a requisition on title to *M*, desiring to be informed what the litigation referred to in his letter of acceptance was. *M* replied by saying that he referred to the administration suit pending in the Chief Court. On 7th January, 1919, however, *M* informed the plaintiff bank that he was unwilling to transfer the property in question to the plaintiff, as his mother was objecting to the sale.

*Held*, that by 10th July, 1918, *M* and the plaintiff bank had come to a complete agreement for the sale of the property in question to the bank; that the condition that the agreement should be subject to a settlement of any litigation relating to the property before the agreement should take effect was a condition for the protection of *M*, and the plaintiff bank took the risk of any such litigation; and that there was no substantial litigation which could prevent *M* selling.

*Semble*: When a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, no other Court has power to grant permission for the sale of property part of the estate.

In view of some rules of practice of the Chief Court which recognised a power of another Court to grant permission for the sale of property of the

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estate before the Chief Court, their Lordships hesitated to declare that the Court of the District Judge of Amherst had no power to grant to *M* permission to sell the suit property.

Form of preliminary decrees in suits for administration.

Appeal from a decree of the Chief Court of Lower Burma, dated the 11th July, 1922.

*G. Lawrence* and *E. F. W. Besley* for appellant.

*Sir George Lowndes* and *E. B. Raikes* for respondents.

23rd July, 1925. The Judgment of their Lordships was delivered by

Sir John Edge.

SIR JOHN EDGE :—This is an appeal from a decree of the 11th July, 1922, of the Chief Court of Lower Burma, in its Civil Appellate Jurisdiction, which affirmed a decree of the 9th June, 1920, of the Chief Court in its Original Civil Jurisdiction. The parties to the appeal are Ma Chit Su, a defendant, who is the appellant, and the National Bank of India, Limited, who was the plaintiff and Maung Myat Thin, the first defendant, who are the respondents.

The suit was brought against Maung Myat Thin and the Bank of Bengal for a decree for specific performance of a contract to sell immoveable property in Rangoon. The appellant, who is the mother of Maung Myat Thin, was on her own application brought on the record on the 1st March, 1920, as a defendant. The Trial Judge gave the plaintiff a decree for specific performance. From that decree Ma Chit Su appealed. The Appellate Court, by its decree, dismissed that appeal, and from that decree of dismissal this appeal has been brought. The questions in this appeal are—(1) Whether there was a completed agreement for the sale of the property ; (2) whether the alleged agreement to sell the property was not subject to a condition that any litigation relating to the property should be settled before the agreement could take effect ; and (3) whether the agreement to sell was within the scope of the authority of Maung Myat Thin.

The facts of the case are as follows :—Maung Myat Thin was the eldest child of Maung Shwe Oh and his wife Ma Chit Su. Maung Shwe Oh died on the 5th June, 1906, leaving his wife Ma Chit Su and his nine children surviving him. At the time of his death the property in question in this suit belonged to Maung Shwe Oh and his brother Maung Shwe Goh jointly. They had carried on business in partnership. On the 17th March, 1907, letters of administration were, on the application of this appellant, Ma Chit Su, granted by the

District Court of Amherst under the Probate and Administration Act (V of 1881) to Maung Myat Thin to administer the estate of his late father Maung Shwe Oh. After the grant of the letters of administration the business, which had been carried on by Maung Shwe Oh and Maung Shwe Goh, was carried on by Maung Myat Thin as such administrator and Maung Shwe Goh in partnership. On the 12th June, 1913, the partnership was by a preliminary decree dissolved, a compromise was agreed to, and by a consent decree Maung Myat Thin became entitled as such administrator to all the assets of the partnership, including the property in question, and became liable to all the debts of the partnership with certain exceptions which are not material and need not be further referred to. On the 27th November, 1913, Maung Shwe Goh executed releases in favour of Maung Myat Thin of all the immoveable property of the partnership, including the property in question.

As such administrator Maung Myat Thin was indebted to the Bank of Bengal for moneys advanced. As security for the loan the title deeds of the property in question had been deposited with that bank on the 7th May, 1901, which thereby acquired an equitable mortgage. Maung Myat Thin was involved in some litigation with members of his family. Early in 1914 an administration suit was instituted in the Chief Court of Lower Burma by Ma Chit Su on her own behalf and on behalf of her eight younger children against Maung Myat Thin and others for the administration by the Court of the estate which was in his hands. It will be remembered that Maung Myat Thin was then the administrator who had been appointed by the District Court of Amherst. On the 22nd November, 1916, Maung Myat Thin made a deposition in that suit for administration in the High Court, in which he stated: "So far as I am concerned I consent to its" (the estate) "being administered by the Court. I understand that the administration will be taken out of my hands." He was alluding to his rights as an administrator on his appointment by the District Judge of Amherst in 1907. On the 22nd November, 1916, the High Court in the administration suit ordered that certain accounts should be taken and certain enquiries made, and that the suit should stand adjourned for making a final decree until the accounts and inquiries had been taken and made. A final decree was at some time made by the Chief Court, but is not before their Lordships. It is true that the Chief Court had not been asked to appoint a

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Receiver or to issue an injunction to Maung Myat Thin not to continue to act as an administrator under his appointment as an administrator by the District Judge of Amherst. The preliminary decree which was made by the Chief Court on 22nd November, 1916, seems to have been a common form of such decrees in suits for administration in the Chief Court. It appears to their Lordships that it is advisable that that form of decree should be revised by the Court, now the High Court, so that there can in future be no question as to a conflict of authority between the High Court in an administration suit and a District Court which had appointed an administrator of the same estate. Such a conflict could not have arisen as it did in this case if the High Court had either appointed a Receiver or had issued an injunction; either would have determined any right which Maung Myat Thin had under his appointment as an administrator by the District Judge of Amherst.

On the 27th April, 1917, Maung Myat Thin applied to the Court of the District Judge of Amherst for permission to sell the property in question, and on 26th June, 1917, that Court granted to him permission to sell that property. That application was made under S. 90 of the Probate and Administration Act, 1881, as amended by Act VI of 1889.

On the 9th July, 1918, Maung Myat Thin, on the introduction of the Bank of Bengal, called on Mr. Smith, the manager of the plaintiff bank, and they discussed the terms upon which Maung Myat Thin would sell to the National Bank of India, Limited, and that bank would purchase from Maung Myat Thin, the property in question. After that interview Mr. Smith, on behalf of the bank, on the 9th July, 1918, wrote the following letter to Maung Myat Thin :—

"National Bank of India, Limited.
"Rangoon, 9th July, 1918.

"Messrs. Shwe Oh Bros. & Co.

"Dear Sirs,

"With reference to your Maung Myat Thin's call to-day, I hereby confirm the arrangement whereby the Bank agrees to purchase the property No. 3, Phayre Street and No. 62, 37th Street, subject to a clear title, for Rupees One lakh and seventy-seven thousand, say Rs. 1,77,000.

"Your confirmation in writing of the above arrangement is requested.

"I am,
"Yours faithfully,
"James Smith,
"*Manager*."

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In reply to that letter Maung Myat Thin sent the following letter :—

"No. 3, Phayre Street,
"Rangoon. 10th July, 1918.

"The Manager,
"National Bank of India, Limited,
"Rangoon.

"DEAR SIR,

'With reference to your letter of the 2nd (*sic*) instant *re* house No. 3, Phayre Street and house No. 62, 37th Street, I hereby confirm the arrangement for sale of the above properties to your Bank for Rs. 1,77,000 subject to settlement being effected of any litigation relating to the same properties.

"I am, yours faithfully,
(Signed) " MAUNG MYAT THIN."

The next thing which happened was that the lawyers who were acting for the National Bank of India, Limited, sent a requisition on title to Maung Myat Thin. The third, fourth, fifth, sixth and eighth requisitions, which alone seem to be of any importance in this suit, with the replies, were as follows :—

"3. On 4th August, 1900, the property was conveyed to Maung Shwe Oh and Mg. Shwe Goh, who were heirs to Maung Shwe Oh. Have any claims been made by any persons other than Mah Hnin Get and Maung Myat Thin to share in the estate of Maung Shwe Oh, deceased?"

*Reply.*—"A suit for administration of Maung Shwe Oh's estate is pending in Chief Court. Commissioner is inquiring into accounts, etc., and I believe he will decide who are the heirs to the said estate."

"4. In Mr. Myat Thin's letter dated 10th July, 1918, the sale is confirmed 'subject to settlement being effected of any litigation rtlating to the properties.' What litigation is referred to in the sentence ?"

*Reply.*—"There is an application pending in Chief Court for execution of decree against Shwe Oh Bros. & Co. by Ma Thein Zin, a decree-holder; also there is the administration suit referred to in answer to question (3)."

"5. Are there any (and if so what) claims being made or threatened in respect of the above property? (Give full particulars.)"

*Reply.*—"Whether any claims will be made or not in respect to this property will depend on the finding of the Commissioner referred to in answer to question (3)."

"6. Are there any (and if so what) persons likely to object to the sale to the National Bank of India, Limited?"

*Reply.*—"Same answer as to No. 5 question."

"8. A certified copy of the order granting leave to sell must be furnished."

*Reply.*—"I shall write to the Bank of Bengal to send the copy which is, I believe, with them."

On the 7th January, 1919, the solicitors of Maung Myat Thin informed Mr. Smith, the manager of the National Bank

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of India, Limited, that he was unwilling to transfer the property in question to the bank, as his mother was objecting to the sale.

Maung Myat Thin had made full disclosure to the National Bank of India, Limited, of his position and of such right as he had to sell the property in question, and that bank accepted such title to sell as he had, and brought this suit for specific performance. Their Lordships find that by the 10th July, 1918, Maung Myat Thin and Mr. Smith, as the manager and agent of the bank with full authority to act on behalf of the bank, had come to a complete agreement for the sale of the property in question to the bank. The condition that the agreement should be subject to a settlement of any litigation relating to the property before the agreement should take effect was a condition for the protection of Maung Myat Thin, and the National Bank of India, Limited, took the risk of any such litigation; there was no substantial litigation which could prevent Maung Myat Thin selling.

Their Lordships have had some difficulty in arriving at a conclusion that Maung Myat Thin had power to sell the property without having obtained the previous permission of the Chief Court to do so. The suit for an administration of the estate had been entertained by the Chief Court, and was pending in that Court, and it is difficult for their Lordships to understand that the Legislature could have intended that when a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, any other Court should have power to grant permission for the sale of property part of the estate; but it appears from the judgments in this suit of the Chief Court that according to some rules of practice of the Chief Court the Chief Court recognised a power of another Court to grant permission for the sale of property of the estate before the Chief Court.

Mr. Justice Young, who was the Trial Judge in this suit, and had been the Judge who had made the decree in the administration suit, referred to *Berry* v. *Gibbons* (1), as an authority that a judgment in England for administration does not prevent executors from exercising a discretionary power vested in them except so far as its exercise conflicts with the order of the Court. The passage in *Berry* v. *Gibbons* (1) which Mr. Justice Young was considering as applicable to the

1. (1873) 8 Ch 747.

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question before him was evidently a passage in the judgment of Lord Justice James at page 750 of the Report. What Lord Justice James is there reported to have said was :—

"The doctrine of *lis pendens* has no bearing on the case, for a mere administration decree, no Receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in exercise of those powers."

The passage in Lord Justice James's judgment to which their Lordships have referred must be read with a knowledge of what was then the statute law in England, and has no possible bearing on a case in India to which an Act of the Indian Legislature applies.

Their Lordships hesitate to interfere with what appears to be a rule of practice of the Chief Court, and to declare that in this case the Chief Court ought not to have found that the Court if the District Judge of Amherst had power to grant to Maung Myat Thin permission to sell the property in question.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors for appellant : *Light and Fultun.*

Solicitors for respondents : *Sanderson, Lee and Co.*

A. de M. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Suryadevara Mahalakshmamma ... *Appellant* (Plaintiff)*

*v.*

Suryadevara Ramaswami and others ... *Respondents (Defendants).*

*Hindu Law—Widow—Alienation by—Validity—Sale on account of inconvenience of management and consequent loss of income and for purpose of buying other land of equal or greater value and more convenient for cultivation and management.*

In a suit brought by the daughter of a deceased Hindu to set aside an alienation made by her mother of immoveable property which belonged to her deceased father, it appeared that the land in question was situated in an out-of-the-way village situated far away from Kollur, which was the plaintiff's mother's residence, that the land yielded very little, and that the object of the sale was, with the aid of the proceeds of the sale and some other money contributed by the plaintiff's mother, to purchase in plaintiff's name better land in Kollur which was more convenient for cultivation.

*Held*, that the sale was valid and binding on the plaintiff and could not be set aside.

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*S A No. 983 of 1923. 8th January, 1926.

Maha-lakshmamma v. Ramaswami.

Second appeal against the decree of the District Court of Guntur in A. S. No. 157 of 1922 preferred against the decree of the Court of the District Munsif of Tenali in O. S. No. 794 of 1920.

*G. Lakshmana* for appellant.

*Ch. Raghava Rao* for respondents.

The Court delivered the following

JUDGMENT :—This is an idle suit and an idle appeal. The plaintiff, who was the daughter of the last male-holder, brought this suit to set aside an alienation made by her mother on the 24th February, 1900, of immoveable property which belonged to her deceased father and to recover the same. At the trial it came out that the land in question was sold because it was situated far away from Kollur, which was the plaintiff's mother's residence, in order to buy better land in Kollur itself. Both the District Munsif and the District Judge found that the sale was valid and binding on the plaintiff, because the lands sold were situated in an out-of-the-way village and yielded very little and because the object of the sale was, with the aid of the proceeds of the sale and some other money contributed by the plaintiff's mother, to purchase in plaintiff's name better land which was more convenient for cultivation. The suit was therefore dismissed.

Now it is argued in second appeal that the defendants failed to prove necessity for the sale. Reliance is placed on a decision in *Ganesa Aiyar* v. *Amrithasami Odayar* (1) in which Kumaraswami Sastri, J. observed : "Families often own lands at some distance from their village and I do not think the mere fact that the lands are a few miles away would justify a Hindu father in alienating the lands." In that case the lands that were sold were within 10 miles of the 1st defendant's village. The substantial reason for the Court setting aside the alienation in that case appears from the words at page 247 : "The family was not a trading family or one carrying money-lending business and the starting of prospective money-lending transactions is no ground for alienating family properties." The starting of money-lending transactions was one of the objects with which the family property had been sold.

Then in *Ganap* v. *Subu* (2), there is this observation of Justice Batchelor: "a widow can alienate in order to preserve

1. (1917) 23 M L T 245. 2. (1908) I L R 32 Bom 577.

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the estate but we do not think that she is entitled to alienate merely in order to improve it." In *Subramania Chetty* v. *Chidambara Mudali* (3) Sadasiva Aiyar, J. *In re Krishnaswami Doss Reddi* (4) that manifest benefit was sufficient and it was not necessary to prove necessity for an alienation made by a manager of a Hindu family (for it to have a binding effect on the junior member's shares. What Sundara Aiyar, J., said was: "It must certainly be shown that the family would not lose by parting with ancestral lands and purchasing new land. This would necessitate the gviving of evidence to show that the new lands are at least not inferior in quality and value to the old lands. It may be open to an alienee to establish reasonableness by showing that though the new lands are not superior in value to the old lands, the family would otherwise gain by the changes." The learned Judges was inclined to substitute the question of whether the sale was a proper and reasonable act for the question whether it was necessary, in cases of alienation. This view finds support in the case decided by the Privy Council in *Ramasuman Prasad* v. *Shyam Kumari* (5). Their Lordships point out that the word "necessity" when used in this connection has a somewhat special, almost technical meaning. They say that if an act alienation of a widow is reasonable and prudent and for the interest of the estate in matters of compromise, it will fall within the power of the holder of a Hindu women's estate, either as being an alienation which is deemed to be induced by necessity or as being in a parallel position to an alienation induced by necessity. I am of opinion that the view taken in *Ganap* v. *Subu* (2) as to the meaning of "necessity" and "benefit" is too narrow. If the parties who have to support an alienation made by a widow can show that the estate has been improved by selling immoveable property and buying other lands of equal or greater value and more convenient for cultivation and management, Courts will not set aside such transactions. In *Subramania Chetti* v. *Ramakrishnamma* (6), a case came before Devadoss, J., and myself in which a widow borrowed money and improved her husband's estate by completing an unfinished house. We held that the reversioner who had taken the benefit of the improvements made by the widow was not entitled to impeach the act of alienation by which the estate had been

2. (1908) I L R 32 Bom 577.
3. (1921) 41 M L J 459.
4. (1912) M W N 167.
5. (1922) 49 I A 342 at 346.
6. (1924) 20 L W 627.

Maha-lakshmamma v. Ramaswami.

improved. The present case is a stronger one, because there has been no loss or encumbrance upon the estate caused by the alienation, seeing that the plaintiff's mother left the estate in possession of better lands in place of those sold away and more conveniently situated for cultivation.

There are no merits in this second appeal. It is dismissed with costs.

A. S. V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN.

The Public Prosecutor ... *Appellant**

*v.*

Kalia Perumal Nayakar ... *Accused.*

The Public Prosecutor v. Kalia Perumal Nayakar.

*Madras District Municipalities Act (V of 1920), S. 249, Sch. V, cl. (o)—Person who sells grain wholesale—Commission agent if a—Crier or auctioneer who auctions the goods of another person in the latter's presence if a—Failure to take out a license—Conviction under S. 338 for—Liability for—Distinction.*

The accused sold by auction bandy-loads of grain wholesale. The grain belonged to his customers who sent it to him for sale and he effected the sale by auction and obtained a remuneration by way of commission.

*Held,* that even as a commission agent the accused was the person who sold the grain within the meaning of S. 249 of the District Municipalities Act (V of 1920) read with Sch. V, cl. (*o*) thereof, and was liable to be punished under S. 338 for failure to take out a license.

*Semble*: The case of a mere crier or auctioneer who auctions the goods of another person in the latter's presence and acts as a mere agent for the purpose may stand on a different footing.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the Second Class Bench Magistrate of Shevapet in Summary Trial No. 1126 of 1923.

*The Public Prosecutor* (*J. C. Adam*) for appellant.

*A. K. Balakrishna Menon, amicus curiae,* for accused.

The Court delivered the following

JUDGMENT:—This is an appeal by the Government against the acquittal by the Bench Magistrate, Shevapet of the counter-petitioner against whom a charge had been brought of failure to take out a license for selling grain wholesale. Under S. 249 of the District Municipalities Act (V of 1920) read with Sch. V, cl. (*o*) of the same act any person who sells grain wholesale has to obtain license. If he

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*Cr Appeal No. 336 of 1925. 18th November, 1925.

The Public Prosecutor v. Kalia Perumal Nayakar.

fails to do so, he is liable to be punished under S. 338. The Bench Magistrate acquitted the accused on the ground that he was only getting commission for auctioning the grain. The question for decision is whether he is not even as a commission agent a person who sells grain. What he actually did was to sell by auction bandy-loads of grain wholesale. The grain belonged to his customers who sent it to him for sale and he effected the sale by auction and obtained a remuneration by way of commission. He is nevertheless the person who actually sold the grain. It is clear therefore that he is a person who comes within cl. (*o*) of Sch. V and must take out a license. It is not a case of a mere crier or auctioneer who auctions the goods of another person in the latter's presence and acts as a mere agent for the purpose. The accused is, as I understand from the records, a commission agent who sells other people's goods and receives remuneration by a commission, he being treated as the actual seller of the goods.

In these circumstances the acquittal must be set aside and the accused convicted under S. 338 of the District Municipalities Act. He is fined Rs. 5 and will undergo simple imprisonment for two days in default of payment of the fine.

A. S. V. *Acquittals of order set aside and fine imposed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER.

Munuswami Pillai ... *Appellant** (*Defendant*)

*v.*

Mahdi Hussain Khan Sahib ... *Repondent* (*Plaintiff*).

Munuswami Pillai v. Mahdi Hussain Khan Sahib.

*Civil Procedure Code, S. 152—Decree—Amendment of, after satisfaction of decree had been entered up and nothing remained to be done under decree—Jurisdiction—Remedy of aggrieved party in case he finds decree to be wrong at that stage.*

In a suit brought by the respondent under the Madras City Tenants' Protection Act to eject the appellant, the latter applied, under S. 9 of that Act, for an order that the respondent should be directed to sell the land for a price to be fixed by the Court. The result of the suit was that the appellant got a decree directing the respondent to convey the land to him upon his paying a stated sum, being the value of the suit land, and that the appellant should pay the respondent his costs and past and future mesne profits. Long after the decree was entered as satisfied and the execution petition of the respondent was noted as disposed of, he applied under S. 152 of Civil Procedure Code for an amendment of the decree by altering the amount to be paid by the appellant as the price of conveyance of the land. The Lower Court allowed the amendment prayed for on the ground that it was only the rectification of a slip due to the mistake of a clerk.

*C C C A No. 38 of 1924. 10th November, 1925.

Munuswami Pillai v. Mahdi Hussain Khan Sahib.

*Held*, reversing the Court below, that the respondent, having taken all that was due to him for costs and mesne profits, and having allowed his execution petition to be entered as disposed of and the decree as satisfied, was estopped from re-opening a closed suit by putting forward the plea that the decree was wrong.

The ground of the decision in (1902) *Pathan Bi* v. *Mytheen Bibi*, 12 M L J 96, that an amendment of a decree after satisfaction has been entered up is a mere nullity unless steps are also taken at the same time to set aside the order recording satisfaction, is a sound objection to the procedure of the Lower Court in amending its decree at the stage when the respondent applied for amendment.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 225 of 1920 as amended by the said Court by order dated 29th October, 1924.

*R. Sriramachariar* for appellant.

*M. S. Venkatarama Aiyar* and *R. N. Rajagopala Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—The respondent brought O. S. No. 225 of 1920 under the Madras City Tenants' Protection Act to eject the appellant. Under S. 9 of that Act, the appellant applied for an order that the landlord should be directed to sell the land for a price to be fixed by the Court. The result of the suit was that the appellant got a decree on 12th May 1922 directing the respondent to convey the land to him upon his paying Rs. 615-6-10, being the value of land at the rate of Rs. 1,100 per ground, and that the appellant should pay the respondent his costs and past and future mesne profits. On 10th July, 1923, in E. P. No. 249 of 1923 the respondent applied for execution by attachment and sale of the superstructure. On 18th December, 1923, the appellant applied in C. M. P. No. 1814 of 1923 for a direction of the Court to the respondent to execute and register the conveyance and got an order that respondent should execute a conveyance in three weeks. On 5th December, 1923 the decree was entered as satisfied and the execution petition noted as disposed of. On 24th September, 1924, the respondent applied under S. 152 of the Civil Procedure Code for an amendment of the decree by altering the amount to be paid as the price of conveyance from Rs. 615-6-10 into Rs. 756-4-0. The appellant filed a counter affidavit alleging that the respondent was vexatiously attempting to get more money out of him by this means and delaying to attend the Registrar's Office for registration of the conveyance. The City Civil Court Judge observed that the amendment asked for was the rectification of a slip due to the

mistake of a clerk and that the petitioner was not estopped from applying, and accordingly he made the order from which this appeal has been preferred. Munuswami v Mahdi Hussain Khan Sahib.

Now S. 152 of the Code of Civil Procedure permits clerical or arithmetical mistakes in judgments and decree to be corrected *at any time,* but it is questionable whether a Court would be justified in making a correction which involved the payment of a larger sum of money by one party to another, long after satisfaction had been recorded, and when nothing remained to be done and the decree had become dead. Under the old Code of Civil Procedure, before errors in decrees were permitted by S. 152 to be corrected "at any time," and when the making of corrections was under S. 206 made obligatory and not discretionary, the High Court of Calcutta in *Fakrudin Mahomed Ahsan* v. *The Official Trustee of Bengal* (1) held that matters, which might have been discussed in the course of execution proceedings, could not be re-opened after execution had been closed and the decree satisfied. The learned Judges observed that, if a judgment-debtor desired to show that more money had been levied from him under the execution than was due from him under the decree, the only course open to him was to apply for a review of the order which declared the decree to be satisfied and the execution proceedings struck off. Under the present Code, the Allahabad High Court in *Pitam Lal* v. *Balwant Singh* (2), revised an order of a Subordinate Court amending a money decree which had been completely satisfied. Daniels, J. observed : "When a decree for money has been finally satisfied and discharged, the Court, is *functus officio* and can no longer entertain an application for amendment under S. 152 of the Code of Civil Procedure." In *Sheo Prasad Rai* v. *Dharam Sen Rai* (3) it was stated that "the dictum in *Fakrudin Mahomed Ahsan* v. *The Official Trustee of Bengal* (1) to the effect that where a decree had been completely executed the Court executing the decree is *functus officio* has not found complete favour in subsequent decisions." Nevertheless, on the facts of that case, the Court dismissed the second appeal of the judgment-debtor against an order of an executing Court, confirmed by the District Court, refusing to cancel the execution proceedings on the ground that lands not covered by the decree had been delivered.

1. (1884) I L R 10 C 538. 2. (1925) 88 I C 396 : 23 A L J 518.
3. (1918) 49 I C 948.

Munuswami v. Mahdi Hussain Khan Sahib.

I am of opinion that the ground upon which *Pathan Bi* v. *Mytheen Bibi* (4) was disposed of, namely, that an amendment of a decree after satisfaction has been entered up is a mere nullity unless steps are also taken at the same time to set aside the order recording satisfaction, is a sound objection to the procedure of the Lower Court, in this case in amendnig its decree at the stage when the respondent applied for amendment. I also think that this application should have been rejected on the ground that it involved a substantial alteration of the terms upon which the land was to be conveyed.

It is contended that, because the lands were found to measure 1,650 sq. ft. the price necessarily had to be varied, after the rate had been fixed at Rs. 1,100 per ground. In answer to this contention, the appellant stated in his counter-affidavit that the land measured only 1,386 sq. ft. The Judge has not decided, in his order now appealed against, which figure is correct. He only says: "If the land is 1,650 sq. ft., the plaintiff is entitled to Rs. 756-4-0." Moreover, the method by which the sum given in the decree was arrived at is not of consequence after the decree has been executed without objection. If the defendant had known, before he took a conveyance for the land, that he would have to pay Rs. 150 more than the sum ordered in the decree, it would have been open to him to have given up possession of this land and taken compensation under S. 3 of the Act instead of getting conveyance executed by Court and registered. The plaintiff, having taken all that was due to him for costs and mesne profits, and having allowed this petition to be entered as disposed of and the decree as satisfied cannot plead mistake and demand a larger sum as consideration for doing that which has been done already. S. 9, cl. 3 declares that "upon a final order being passed directing the conveyance of the land by the landlord to the tenant, the suit shall stand dismissed." The respondent's application may thus be regarded as an attempt to re-open a closed suit, and he is estopped from putting forward a plea that the decree is wrong by his conduct in not taking the objection earlier.

The appeal is therefore allowed with costs and the Lower Court's order directing an amendment of the decree is quashed.

A. S. V. *Appeal allowed.*

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4. (1902) 12 M L J 96.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

The Public Prosecutor ... *Appellant* in both the appeals.*

*v.*

Ayitha *alias* Thaniya and another ... *Accused.*

The Public Prosecutor *v.* Ayitha.

*Madras Planters' Labour Act (I of 1903), S. 4, R. 2 (4) of rules framed under—Descriptive marks of labour—Omission to enter in labour contract—Effect on enforceability of contract.*

The descriptive marks of a labourer are as important as his name and caste, and the omission to enter the same in a labour contract as required by the rules framed under S. 4 of the Madras Planters' Labour Act (I of 1903) makes the contract unenforceable under the Act.

Appeals under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Su-divisional Magistrate of Tellicherry in Cr. Appeals Nos. 13 and 12 of 1925 on his file preferred against the judgments of the Courts of the Second Class Magistrate of Vayitri in C. C. Nos. 836 and 830 of 1924 respectively.

*The Public Prosecutor* on behalf of the Crown.

*T. A. Anantha Aiyar* for accusel.

The Court delivered the following

Devadoss, J

JUDGMENTS :—*Devadoss, J.* :—[*Cr. Appeal No. 339 of* 1925]—This is an appeal by the Public Prosecutor against the decision of the Sub-divisional Magistrate of Tellicherry who quashed the conviction of the accused by the Second Class Magistrate of Vayitri under S. 30 of the Madras Planters' Labour Act (I of 1903) on the ground that the contract executed by the appellant did not contain his discriptive marks as required by law. The contention of the Public Prosecutor is that the omission to mention the descriptive mark of the accused was not a wilful omission but an oversight and that omission should not be held to invalidate the contract. The question is whether the omission to enter any particulars required by the rules vitiates the contract or makes it unenforcible under the Act. The argument of the Public Prosecutor is that the omission to give the descriptive marks of a Labourer is such a negligible thing that it cannot be held to invalidate a contract. He argues "could it be said that a person, who has no descriptive marks or is unable to give his father's name as required by the rules cannot enter into a contract of this kind." The Governor in Council has framed rules under

*Cr Appeals Nos. 339 and 340 of 1925. 17th December, 1925.

The Public Prosecutor *v.* Ayitha

Devadoss, J.

Ss. 4, 13 and 42 of the Planters' Labour Act of 1903. R. 2 (4) is in these terms :

"Labourer's native place (village, taluq and district), caste, age and descriptive marks, and S. 4 says—

"Every contract between a planter and a maistry, and every labour contract shall be in writing and shall be in such form and shall contain such particulars as the local Government may by rules made under this Act direct."

The question is whether the non-compliance with any of these rules as to particulars vitiates the contract? In the contract form there is a column for descriptive marks. That column has not been filled in. It is unnecessary to enquire, for the purpose of this case, whether the accused has any descriptive marks or not. What we are concerned with is to see whether the rules have been complied with. The argument that it is not necessary to fill up one of the columns required to be filled up under the rules either because the column cannot be filled up or it is not necessary to fill it up because of its minor importance does not commend itself to me. The Madras Planters' Labour Act of 1903 is an exceptional piece of legislation. It converts the civil liability into the criminal liability of a labourer and subjects him to imprisonment for one month with or without fine. When the legislature enacts that in order to give validity to a contract certain formalities should be complied with, it is not for the Court to say whether any of the formalities is necessary or not. It may be as the Public Prosecutor argues that if a person has no descriptive marks, or if he is not able to give his father's name, the contract cannot be executed. But where, owing to wilful omission or carelessness the columns are not filled up, it cannot be said that one of the particulars required by the rules is not of such importance as to make the contract invalid. The rules require that the labourer's native place, village, taluq and district, caste, age and descriptive marks should be given. If a labour contract does not contain the name, caste, or age of the labourer, can we hold that the contract is a valid one? Whatever may be the reason for the legislature requiring such particulars, it is not for the Court to enquire into the reasonableness of it. When the legislature, for reasons best known to itself, requires certain formalities to be gone through, or certain formalities to be observed, in order to make a contract valid, or when it requires certain descriptions or particulars to be given in a contract to make it valid, the Court cannot consider any one of the terms or requisites as of no importance. I think the descriptive marks of a labourer are as important as his

name and caste and therefore the omission to give descriptive marks makes the contract unenforcible. It is not suggested that these rules have not got the force of law. Such a contention would be on the face of it untenable, for the rules are framed under Ss. 4, 13 and 42 of the Act. In the Assam Labour Act (VI of 1901), the form to be filled in is made part of the Act itself, and the Madras Act is evidently based upon the Assam Labour Act and it cannot be said that the Madras Legislature has required certain particulars to be given in the form without due consideration. When a similar enactment in another province requires the descriptive marks to be given in the contract, we may take it that it is for good reasons that the Legislature required them.

The Legislature does require certain formalities for the validity of certain contracts. For instance in the case of statutory bodies no contract which is not under seal is valid. Even if a statutory body has acted on such a contract, yet, when that contract is sought to be enforced in a Court of Law, it cannot be enforced if this is not under seal. The law requires certain documents to be attested and such documents may be proved only by proving attestation. The Courts are bound to give effect to the law as they find it and not to consider whether certain formality is essential or non-essential. It is urged that a good many contracts might be declared invalid if such a literal construction of the rules is to prevail; but it is not the function of the Court to consider what effect the decision will have. The duty of a Court is to interpret and apply a statute as it finds, and no provision of law should be considered unnecessary or immaterial. The labourer is as much entitled to protection as the planter. Labourers are mostly ignorant people and the protection given under the Act should not be lightly taken away. The legislature evidently in order to prevent unscrupulous maistries and others inducing labourers to enter into contracts which might afterwards be found irksome to them, requires that certain formalities should be gone through and certain particulars should be entered in the contract to safeguard them and to prevent them from escaping the consequence of the non-fulfilment of the contract by pleading that they are not the persons who signed the contract. The Act takes the precaution to see that everything is done above board and to the knowledge of the labourer. For instance, it lays upon the Magistrates or other persons before whom such labour contracts are signed, a duty

The Public Prosecutor v. Ayitha — Devadoss, J.

to see that the terms are fully explained to and are understood by the parties. In the face of the considered policy of the Act and the clear terms of Ss. 4 and 7 it cannot be said that the Sub-divisional Magistrate was wrong in setting aside the conviction of the accused on the ground that the descriptive marks were not given in the contract.

I therefore decline to interfere with the order of the Magistrate and dismiss this appeal.

[*Cr. Appeal No.* 340 *of* 1925]—Same order in Criminal Appeal No. 340 of 1925.

Waller, J.

*Waller, J.*:—[*Cr. Appeals Nos.* 339 *and* 340 *of* 1925]—I agree that the appeal must be dismissed. The rule framed under S. 4 of the Act requires that, among other particulars, the descriptive marks of the labourer shall be entered in the contract. In these cases, no such marks have been entered. In fact, no attempt has been made to comply with the rule. It is not asserted that respondents have no descriptive marks and I infer from Mr. Adam's admission that a large number of similar contracts may be affected by our decision, that the rule has been habitually ignored. There is, of course, in neither case any dispute as to the identity of the labourer, but that is not to the point. In order that the contract may be enforceable under the Act the law requires that certain things shall be entered in it. If they are omitted the contract cannot be enforced.

A. S. V. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

Karipineni Rajayya ... *Appellant** (*Defendant*)

*v.*

Kalapatapu Annapurnamma, minor by guardian Mangamma, *vide* Order dated 2—1—'25 on C. M. P. No. 3615 of 1914 ... *Respt.* (*Plaintiff.*)

Rajayya v. Annapurnamma.

*Execution sale—Nullity or irregularity merely—Death of judgment-debtor after order for sale but before actual sale—Sale without impleading his legal representatives.*

After an order for the sale of a judgment-debtor's property was made but before the sale took place, the judgment-debtor died, and the sale was held without impleading his legal representatives.

*Held,* that the sale was a nullity and not a mere irregularity.

Second Appeal against the decree of the Court of the Subordinate Judge at Masulipatam dated the 11th day of Sep-

*S A No. 292 of 1923. 19th August, 1925.

tember, 1922, in Appeal Suit No. 65 of 1922 preferred against the decree of the Court of the Principal District Munsif of Gudivada in Original Suit No. 602 of 1919. Rajayya v. Annapurnamma.

*V. Ramadoss* and *P. Satyanarayana Rao* for appellant.

*A. Venkatachalam* for respondent.

The Court delivered the following

JUDGMENT:—The main question for consideration in this Appeal is whether the sale in execution of the property of the deceased judgment-debtor is a mere irregularity or a nullity. It appears that in this case an order for the sale of the judgment-debtor's property was made and that before the sale took place, the judgment-debtor died. His legal representatives were not impleaded. There are two cases of this Court which are exactly applicable, one reported in *Ragunathaswamy Aiyangar* v. *Gopaul Rao* (1) and the other in *Doraiswami* v. *Chidambaram Pillai* (2). The decisions being directly opposed to one another, it is suggested for the appellant that in view of this difference of opinion, this second appeal should be referred to a Bench but, as I will explain, I do not think that is necessary.

In *Raghunathaswami Aiyangar* v. *Gopaul Rao* (1) Oldfield and Ramesam, JJ., held that the sale in execution which took place after the death of the judgment-debtor without bringing the legal representatives on record was a nullity. Spencer and Krishnan, JJ. in *Doraiswami* v. *Chidambaram Pillai* (2) held exactly the contrary. The Full Bench decision in *Rajagopala Aiyar* v. *Ramanuja Chariar* (3) does not in terms decide the point at issue but it did hold, overruling in *Doraiswami* v. *Chidambaram Pillai* (2), that an omission to give notice under O. 21, R. 22 renders a sale held in execution a nullity. It does in effect deal with the present question at issue, although in that case the judgment-debtor was not dead but no notice was issued in accordance with O. 21, R. 22. The question is, however, definitely decided by the Privy Council in *Raghunath Das* v. *Sundar Das Katri* (4). That was a case, where after the sale had been proclaimed and had even been adjourned to a future date, the judgment-debtor became an insolvent. Notice was given to the Official Assignee, but the notice apparently was merely a notice asking him whether he would come on record and it was not a notice that execution would proceed

1. (192•) 41 M L J 547. 2. (1923) I L R 47 M 63: 45 M L J 213.
3. (1923) I L R 47 M 288: 46 M L J 104 (F B).
4. (1914) I L R 42 C 72: 27 M L J 150 (P C).

Rajayya v. Annapurnamma.

against him. It was there held that inasmuch as the property passed by operation of law from the judgment-debtor to the Official Assignee, execution could not proceed until the Official Assignee had been brought before the Court and an order binding on him had been obtained. Their Lordships further remark that "a notice under S. 248 of the Code (corresponding to O. 21, R. 22) is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representatives of a deceased judgment-debtor." No distinction can be drawn between the civil death of a judgment-debtor as the result of insolvency and the actual death of the judgment-debtor and the effect would appear to be exactly the same. When the sale in this suit was held, the judgment-debtor in whom the property had vested was dead and consequently the property could no longer vest in him and there could be no sale of his property but only of property which had been his before his death. The property that was sought to be sold is property which at the date of the sale had became vested in the legal representative of the debtor and inasmuch as that legal representative was not on record, there could be no valid sale as against him.Provision for executing the decrees after the death of the judgment-debtor is contained in S. 50 of the Civil Procedure Code, which provides that the decree-holder may apply to execute them against the legal representatives. I do not think that I need discuss the question whether execution can be taken against a deceased man, for that is not possible. He cannot be arrested and he has no longer any property to be proceeded against. Therefore the only remedy for a decree-holder is to proceed against the legal representatives as possessing the assets of the deceased and then the provisions of O. 21, R. 22 must be applied. If they are not complied with we have the authority of the Privy Council and a Full Bench of this Court to the effect that the sale is a nullity. The question is thus concluded by authority and the difference of opinion between two Benches of the Court does not render it necessary for me to refer this case to a Bench. I must follow the decision of the Privy Council in *Raghunatha Das v. Sundar Das Khetri* (4) and accordingly I confirm the finding of the Lower Court that the sale was a nullity.

Further, an argument is put forward by the appellant that the finding of the Lower Appellate Court that the brothers were divided is wrong in law. The Subordinate Judge relies

4. (1914) I L R 42 C 72: 27 M L J 150 (P C).

on oral evidence and the circumstances of the case for arriving at this finding, and that evidence is not before me and, I am not therefore in a position to say that there was no evidence on which his finding could be based. Being a finding of fact, I must accept it. The Second Appeal is accordingly dismissed with costs.

Rajayya *v.* Annapurnamma.

A. S. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE MADHAVAN NAIR.

C. R. Subramania Aiyar .... *Petitioner* (Decree-holder—Respondent—Appellant)*

*v.*

The Official Receiver, Tanjore, and another ... *Respondents (Petitioner and added party).*

Subramania Aiyar *v.* The Official Receiver, Tanjore.

*Provincial Insolvency Act of 1920, Ss. 20, 28, 29, 51 and 52—Interim Receiver—Appointment of—Execution sale of insolvent's property before interim Receiver takes possession and before adjudication order—Validity—Powers of interim Receiver—Insolvency of Hindu father—Sale of family property for payment of antecedent debts—Father's power of—If can be exercised by Official Receiver and by interim Receiver.*

An execution sale was held on 30th September, 1920. Seven days previously the 1st judgment-debtor, who was the father of the other judgment-debtors, presented an insolvency petition. An interim Receiver was appointed and he wrote and asked the Subordinate Judge to stop the sale. It was nevertheless held and confirmed by the Subordinate Judge on 27th November, 1920. An adjudication order in insolvency was made on 15th December, 1920, which was finally confirmed by the High Court. The Court below set aside the sale on the ground that the Subordinate Judge ought to have stopped the sale as soon as he was informed about the appointment of the Official Receiver as interim Receiver.

*Held,* reversing its order, that, although the Official Receiver wrote to the Subordinate Judge asking him to stop the sale, yet as he was acting only in the capacity of an interim Receiver, and as he was not, therefore, in possession of the debtor's properties, the Sub-Judge was not bound to stop the sale or to direct the property to be delivered to him under S. 52 of the Provincial Insolvency Act.

An interim Receiver has under S. 20 of the Provincial Insolvency Act only the powers of a Receiver appointed under the Code of Civil Procedure and he is not clothed even with those powers till he takes possession of the debtor's properties. A Receiver appointed under the Code must obtain possession before the leave of the Court is required for disturbing his possession. Until he is actually in possession a creditor is not debarred from proceeding to execution. The Receiver referred to in Ss. 51 and 52 of the Provincial Insolvency Act is a Receiver appointed upon adjudication.

*C R P No. 1140 of 1923 and A A A O No. 140 of 1923. 23rd September, 1925.

Subramania Aiyar *v.* The Official Receiver, Tanjore.

Under S. 28 of Act V of 1920 vesting only takes place upon adjudication, and under S. 29 it is not till then that a Court in which proceedings are pending against a debtor is bound to stay them.

*Quaere*: Whether under the Provincial Insolvency Act the Official Receiver can exercise the right of the insolvent father to sell his son's share in immoveable property to pay antecedent debts.

Effect of decision of Privy Council in *Sat Narain* v. *Behari Lal*, (1924) 47 M L J 857 (P C).

*Held*, that even if the Official Receiver had that power, it was not possessed by an interim Receiver, in whom for want of an order of adjudication the property of the insolvent had not yet vested.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of West Tanjore at Tanjore in A. S. No. 128 of 1921 preferred against the order of the Court of the Subordinate Judge of Kumbakonam, dated 27th November, 1920, and made in E. A. No. 973 of 1920 in O. S. No. 63 of 1918.

*T. R. Ramachandra Aiyar* for appellant.

*S. Subramania Aiyar* and *C. A. Seshagiri Sastri* for respondents.

The Court delivered the following

JUDGMENT :—We are asked to revise the order of the District Judge of West Tanjore (Mr. Viswanatha Sastri) setting aside a sale held in execution of a decree which had been confirmed by the Subordinate Judge of Kumbakonam. The sale was held on 30th September, 1920. Seven days previously, on 23rd September, the 1st judgment-debtor who is the father of the other judgment-debtors presented an insolvency petition. An interim Receiver was appointed and he wrote and asked the Subordinate Judge to stop the sale. It was nevertheless held and confirmed by the Subordinate Judge on 27th November. An adjudication order in insolvency was made on 15th December. A year later the adjudication was annulled by the District Judge and the annulment was set aside by this Court on 23rd January, 1923.

At the outset it will be well to clear the ground of two errors. The learned District Judge states in his order that the adjudication took place on 28th September, 1920. The order which is before us is under the hand and seal of the Official Receiver of the Tanjore District and is dated 15th December, 1920. Next the affidavits filed in support of the petition under O. 21, R. 90, to set aside the sale declare that the properties of the insolvent had become vested in the Official Receiver. Under S. 28 of Act V of 1920 vesting only takes place upon adjudication, and under S. 29 it is not

Subramania Aiyar *v.* The Official Receiver, Tanjore.

till then that a Court in which proceedings are pending against a debtor, is bound to stay them.

An interim Receiver has under S. 20 only the powers of a Receiver appointed under the Code of Civil Procedure and he is not clothed even with those powers till he takes possession of the debtor's properties. This is clear from the section itself. A Receiver appointed under the Code must obtain possession before the leave of the Court is required for disturbing his possession. Until he is actually in possession a creditor is not debarred from proceeding to execution [*vide Livinia Ashton* v. *Madhabmoni Dasi* (1), *Kanailal* v. *Manoo Bibi* (2) and *Rajah Jagadish Chandra Deo Dhabal Deb* v. *Bhubaneswar Mitra* (3)].

The Receiver referred to in Ss. 51 and 52 is a Receiver appointed upon adjudication and the learned District Judge was of opinion that the Subordinate Judge ought to have stopped the sale as soon as he was informed about the appointment of the Official Receiver as interim Receiver. Although the writer of the letter of September, 28th happened to be the Official Receiver of the Tanjore District, he was acting in the capacity of an interim Receiver, and therefore, as he was not in possession of the debtor's properties, the Subordinate Judge was not bound to stop the sale or to direct the property to be delivered to him under S. 52 [vide *Ralla Ram* v. *Ram Labhaya* (4)]. After the sale had been completed there was no reason for setting it aside besides the suggestion that the price fetched was low. The encumbrances on the properties were all set out in the remarks column of the sale Proclamation. Instead of requiring evidence as to the value of the items sold, the learned Judge was guided by hearsay information as to the prices of land prevailing in and near the town of Kumbakonam. It was not shown that any material irregularities were committed in the publication or conduct of the sale or that any one sustained substantial injury thereby. As regards the sale proceeds in Court the Subordinate Judge has told the Receiver that he may make any application that he may be entitled to make in respect of them. As the sale took place after the petition to be declared insolvent was presented, applications for distribution of the assets will be dealt with under S. 51.

As regards the sons' shares the learned District Judge observed that the Official Receiver can exercise the right of the in-

1. (1910) 11 C L J 489. 2. (1919) 29 C L J 424.
3. (1922) 27 C W N 38. 4. (1924) 6 Lah L J 232.

Subramania Aiyar *v.* The Official Receiver, Tanjore.

solvent's father to sell his son's shares in immoveable property to pay antecedent debts. This view as to the powers of an Official Receiver under the Provincial Insolvency Act receives support from *Rangiah Chetti* v. *Thanikachala Mudali* (5), *Nunna Chetti* v. *Chidaraboyina* (6), *Kuppuswami Goundan* v. *Marimuthu Goundan* (7) and *Narasimudu* v. *Basava Sankaram* (8) and is consistent with the acknowledged right of creditors to proceed against the sons' shares for the satisfaction of debts of a Hindu father that are either illegal or immoral, and with the principle that in the interest of the creditors the father's power of disposition of property for discharging antecedent debts should not be lost upon his being adjudicated insolvent, but should be vested in the responsible official who is entrusted with the proportional distribution of his estate and payment of his debts.

A different view has been taken by a Bench of this Court as to the powers of an Official Assignee over the sons' shares under the Presidency Towns Insolvency Act in *Official Assignee of Madras* v. *Ramachandra Aiyar* (9) and by the Judicial Committee of the Privy Council in *Sat Narain* v. *Behari Lal* (10) who had to construe the meaning of Ss. 2 (*c*) and 52 (2) (*b*) of that Act, of which the latter section has no counter-part in the Provincial Insolvency Act, with which we are now concerned. Their Lordships expressed no opinion as to the correctness of *Rangiah Chetty* v. *Thanikachala Mudali* (5) and *Nanna Setti* v. *Chidaraboyina* (6), which as they point out, are decisions under different statutes.

It may be that in the light of the Privy Council's decision as to the power exercisable by an Official Assignee under the Presidency Towns Insolvency Act, the correctness of the decisions of this Court as to the powers of Official Receivers under the Provincial Insolvency Act may some day require reconsideration, but it is unnecessary to discuss the question further in the present case, because the learned District Judge was certainly mistaken in thinking that the powers of an Official Receiver, whatever they may be under a correct interpretation of the sections of the Provincial Insolvency Act, was possessed by an interim Receiver, in whom for want of an order of adjudication the property of the insolvent had not yet vested.

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5. (1895) I L R 19 M 74.
6. (1902) I L R 26 M 214.
7. (1924) 47 M L J 487.
8. (1924) 47 M L J 749.
9. (192[illegible]) I L R 46 M 54: 43 M L J 569.
10. (1924) 47 M L J 857.

Subramania Aiyar v The Official Receiver, Tanjore.

The Civil Revision Petition is allowed and the order of the Subordinate Judge is restored with costs of the petitioner in this Court including the printing of documents which was done in the Civil Miscellaneous Second Appeal and in the District Court and the costs in C. M. S. A. No. 37 of 1922 in this Court and the District Court to be paid out of the Insolvent's estate.

The Civil Miscellaneous Second Appeal (140 of 1923) is dismissed as a second appeal will not lie by reason of S. 104 (2), Civil Procedure Code.

A. S. V. *Petition allowed: Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER.

Kunkalakunta Veniah ... *Appellant* in both (Defendant in the former and plaintiff in the latter.)*

v.

Mandlem Guraviah and others ... *Respondents in both (Plaintiffs in the former and Defendants in the latter.)*

Kankalakunta Veniah v. Mandlem Guraviah.

*Transfer of Property Act, S. 54—Contract to sell—Ejectment suit by vendor against vendee—Part-performance—Plea of, when open to defendant—Legal representatives of vendor—Plea if open against—S. 27 (b) of Specific Relief Act—Effect—Hindu Law—Joint family—Father—Contract to sell family property—Possession transferred to vendee—Sons subsequently born if bound by contract—Tenant-in-common—Alienee from—Right to ask for general partition—Limitation—Plea of—Second appeal—Maintainability for first time in.*

*M* and *R*, two undivided brothers, became divided in status, but kept the suit lands undivided for future partition by metes and bounds. While yet *R* had no son, he entered into a contract to sell the suit property to the defendant in 1911. Subsequently the plaintiffs 2 and 3 (minor sons) were born to *R*. In 1919 *M* and plaintiffs 2 and 3 brought a suit against the defendant to recover possession of the suit property. The defendant instituted a cross-suit for specific performance of the contract to sell entered into by *R*, who had died before.

It was found that the defendant continued to be in possession of the suit property from 1911, that his possession of it was referable to the contract to sell, and that he had paid the price payable by him under the said contract.

*Held*, that the defendant could successfully plead his possession and the contract for sale as a defence to the suit against him for possession so far as plaintiffs 2 and 3 were concerned, that in the suit for possession *M*, the 1st plaintiff, alone was entitled to recover his moiety of the suit property, the claim of plaintiffs 2 and 3 being dismissed, and that, in the suit for specific performance, the defendant was entitled to the execution of a sale deed conveying the interest of plaintiffs 2 and 3 in the suit property.

*S A Nos. 1803 and 1804 of 1922. 7th September, 1925.

Kankalakunta Veniah *v.* Mandlem Guraviah.

Plaintiffs 2 and 3 having been born both after the contract to sell had been entered into by their father and after the possession had been transferred, they acquired at birth no interest in the suit property. As the legal representatives of the party to the contract, they were bound by it; and under S. 27 (*b*) of the Specific Relief Act, specific performance could be enforced against them.

Even if the defendant's possession was not referable to the contract, possession coupled with an agreement to sell and payment of the prise were good defences against the action for possession.

*M* and *R* having become divided in status, the defendant was an alienee, not from a co-parcener, but from a tenant-in-common, and was not confined to the remedy to ask for partition of the undided share of his vendor.

Second Appeal against the decree of the Court of the District Judge of Guntur dated 22nd February, 1922 in A. S. Nos. 263 and 264 of 1921 preferred against the decrees of the Court of the District Munsif of Narasaraopet, dated 21st March, 1921, in O. S. Nos. 1440 of 1919 and 199 of 1920 respectively.

*Ch. Ragava Rao* for appellant.

*V. Suryanarayana* for respondents.

The Court delivered the following

JUDGMENT:—These two appeals arise out of connected suits O. S. No. 1440 of 1919 was a suit brought by M. Guravayya and the minor sons of his deceased brother Ramaguruvayya to recover possession of lands in the possession of the defendant. O. S. No. 199 of 1920 is a suit by the defendant in O. S. No. 1440 for specific performance of a contract to sell entered into by Ramaguruvayya, father of plaintiffs 2 and 3 in O. S. No. 1440. In the first of these suits the plaintiffs alleged that the suit lands were taken on lease by one Nowloor Periah, that the defendant got into possession and was paying rent for some years but afterwards refused to pay rent or to surrender possession. Both the Lower Courts found against the truth of the alleged lease in favour of the defendant. The District Munsif found that the father of plaintiffs 2 and 3, Ramaguruvayya, had purchased the suit lands under Ex. II from Nowloor Periah, to whom the family had previously sold the same property, in discharge of debts and cash received at purchase. Afterwards, Ramaguruvayya contracted to sell the suit property to the defendant and gave him a receipt (Ex. I) for payment of the purchase money Exs. I and II were executed in 1911. After this the two minor plaintiffs were born. Both the Lower Courts have taken it as proved that Ramaguruvayya became divided in

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status from his brother, the first plaintiff, before the minor plaintiffs were born and that they kept the suit lands undivided for future partition by metes and bounds.

The District Munsif dismissed the suit for possession on the finding that Ramaguruvayya entered into a contract to sell the property to the defendant. In the other suit he gave the plaintiff a decree for specific performance and directed the guardian of the minor defendants to execute a sale deed within four months.

The District Judge on appeal found that the suit lands formed part of the ancestral property of the joint family and that Ex. A, a sale deed of 1903, formed the root of title in the joint family of the plaintiffs. He also found that there was no satisfactory evidence that the first plaintiff and Ramaguruvayya had sold the property to Nowloor Periah, and therefore Nowloor Periah could not pass any valid title to Ramaguruvayya. Then, as regards the contract to sell, Ex. I, he held that this was only evidence of an agreement to sell and did not operate as a transfer of title. There is no discussion of the sections of the Transfer of Property Act or the Specific Relief Act in the judgment, but the District Judge was apparently referring to S. 54 of the Transfer of Property Act and the provision therein contained that a contract for the sale of immoveable property does not of itself create any interest in or charge on such property. At the time when the District Judge gave his judgment the decision of the Full Bench of this Court in *Vizagapatam Sugar Co.* v. *Muthurama Reddi* (1) had not been pronounced. That Full Bench dissented from the previous rulings of two Full Benches in *Kurri Veerareddi* v. *Kurri Bapireddi* (2) and *Ramanathan* v. *Ranganathan* (3) and pronounced that part performance of a contract by way of delivery of possession coupled with an enforceable right to specific performance was a good defence to an action for ejectment.

In this view of the law, the defendant who has been in possession of the property since 1911 and has paid the price can successfully plead his possession and the contract for sale as a defence to the suit of the two minor plaintiffs who claim under Ramaguruvayya. As these two plaintiffs were born after the date of the contract to sell by their father they

1. (1923) I L R 46 M 919: 45 M L J 528 (F B).
2. (1880) I L R 29 M 336.
3. (1917) I L R 40 M 1134: 33 M L J 212 (F B).

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could not acquire at birth any interest in the property to which their father had already parted with his title.

The respondents' vakil relies on some observations in *Ponnambala Pillai* v. *Sundarappayyar* (4) to the effect that a purchaser from a coparcener of an undefined share takes subject to the chance of the vendor's share being diminished before the partition takes place. In that case the plaintiff's father and uncle contracted to sell certain properties as soon as they got possession of the same. Before they got possession the plaintiff was born and his father's brother who was a party to the contract died. The learned Judges observed that there was no authority for the position that a contract to sell made by a Hindu before a son has been born to him is binding on the son who is born before the transfer of the property takes place. There was a suit for specific performance to which the plaintiff was not made a party before he brought his suit for partition, and it was held that he was not bound by the decree for specific performance obtained against his father. In their observations as the binding character of a contract for sale made by a Hindu upon his afterborn sons, the learned Judges make no direct reference to the provisions of the Specific Relief Act or to those of the Transfer of Property Act.

In *Chinnu Pillai* v. *Kali Muthu Chetti* (5) the test applied to find the quantum of interest vesting in the alienee was to ascertain the state of the family at the time when the alienation was made. In the present case plaintiffs 2 and 3 were born both after the contract to sell was entered into and after the possession was transferred.

In *Bappu* v. *Annamalai Chettiar* (6) the co-parceners were apparently all born by the time that the contract was entered into by their father. The plaintiff, who sued after the father's death for specific performance of the contract to sell property in which the sons took an interest at birth had to show that the transaction was for the benefit of the joint family. The fact that here the sons were not born at the time of the contract for sale distinguishes this case from that.

*Kuralia Nanubhai* v. *Mansukhram* (7), *Ram Baksh* v. *Mughlani Khanam* (8) and *Salamat-uz-Zamin Begam* v. *Masha Alla Khan* (9) are all instances where S. 54 of the

4. (1897) I L R 20 M 354: 7 M L J 240.
5. (1911) I L R 35 M 47 at 53: 21 M L J 246 (F B).
6. (1922) 44 M L J 226.
7. (1900) I L R 24 Bom 400
8. (1903) I L R 26 A 266.
9. (1917) I L R 40 A 187.

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Transfer of Property Act is held to be inapplicable to cases where possession has been given and part of the purchase money has been paid. In *Venkata Reddi* v. *Yellappa Chetty* (10) Abdur Rahim and Srinivasa Aiyangar, JJ., held that S. 54 of the Transfer of Property Act did not affect equitable rights arising under a contract of sale.

The contentions of the respondents' pleader (1) that the defendant cannot put forward the defence of part performance of the contract except against a party to the contract, (2) that possession has not been found to be referable to the contract and (3) that the defendant as an alienee from a co-parcener has no remedy except to ask for partition of the undivided share of his vendor, may be answered briefly as follows: (1) that the legal representatives of a party to the contract, such as plaintiffs 2 and 3 are, are bound by the contract and, under S. 27 (b) of the Specific Relief Act, specific performance may be enforced against them. (2) Ex. I speaks of possession having been handed over. The possession thus is referable to the same contract under which the purchase money was paid. Even otherwise, possession coupled with an agreement to sell and payment of the price are good defences against an action for possession. (3) Ramaguruvayya having become divided in status from the first plaintiff, the defendant is an alienee from a tenant-in-common, not from a coparcener. He has no equity to ask for a general partition of the family property against a tenant-in-common. This distinguishes *Subba Goundan* v. *Krishnamachari* (11) from the facts of the present case.

In the result, Second Appeal No. 1803 will be allowed in part and in modification of the Lower Appellate Court's decree the first plaintiff will get a preliminary decree for the recovery of a moiety of the suit property, the claim of plaintiffs 2 and 3 being dismissed. Each party will bear their costs throughout as each side has only partially succeeded.

Second Appeal No. 1804 is allowed. The defence of limitation was raised in this suit (O. S. No. 199 of 1920) but no issue was framed on the question whether the suit was in time, there was no contest on the point, and the respondents cannot be allowed in second appeal to press the point when the appellant has not been called on during the trial to show that

10. (1916) 5 L W 234. 11. (1921) I L R 45 M 449: 42 M L J 373.

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his suit was in time. The sale deed to be executed will of course pass only the interest of defendants 1 and 2 who were directed by the decree of the first Court to execute it as the suit was only against those two represented by their mother as guardian. The decree of the District Judge is set aside and the decree of the District Munsif is restored with costs throughout. Time for execution of the sale deed will be extended to four months from the present date.

A. S. V. *Second Appeal allowed; Decree modified.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* AND MR. JUSTICE REILLY.

Komiresetti Satyanarayana ... *Appellant** (*2nd Respondent*)

*v.*

Yeeranki Chinna Venkatarao and others ... *Respondents* (*Plaintiff and Defendants 3, 8, 7 and 9.*).

Satyanarayana v. Chinna Venkatarao.

*Indian Registration Act, S. 77—Scope of—Remedy provided, if merely optional—Agreement to sell—One of the executants objecting to registration—Registration refused after inquiry by Registration authorities—Suit for specific performance—Maintainability.*

In pursuance of an agreement to sell immoveable property, a sale deed was drawn up, but when it was presented for registration, one of the persons who executed the agreement to sell objected to the registration of the document and the Registration authorities after an inquiry into the matter refused to order registration as against the objector. The vendee instead of suing for compulsory registration under S. 77 of the Registration Act, sued his vendors for specific performance of the agreement. *Held,* the suit was not maintainable. *Venkatasami* v. *Kristayya,* I L R 16 M 341 followed; *Amarchand* v. *Nattu,* 7 A L J 887; *Surendranath Nag Chowdhury* v. *Gopal Chunder Ghosh,* 12 C L J 464; *Nasir-ud-din Midda* v. *Sidhoo Mia,* 44 I C 361 dissented from.

The object of the legislature in enacting S. 77 of the Registration Act was to provide a remedy with a very short period of limitation for putting right a wrongful refusal to register a document, and that must be held to be the only remedy given by law. A person who fails to take advantage of such a statutory remedy cannot ask a Court of Law for the exercise in his favour of the discretionary and equitable remedy of specific performance.

Appeal against the decree of the Court of the Additional Subordinate Judge of Cocanada dated 18th day of April, 1921 in O. S. No. 10 of 1920.

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*Appeal No. 68 of 1922. 16th September, 1925.

*A. Krishnaswami Aiyar* and *P. C. Venkatramayya* for appellant.

*G. Lakshmanna* and *V. Viyanna* for respondent.

Satya-narayana *v.* Chinna Venkatarao

The Court delivered the following

JUDGMENTS:—*The Chief Justice*:—This is an appeal from a decree of the Subordinate Judge of Cocanada wherein he gave certain reliefs by way of specific relief to the plaintiffs. The plaintiffs' case was that certain sums of money were due to them as debts from various people. It is not material for the purposes of our decision to know how those debts were alleged to have come into existence, what was their nature or what were the relations to the plaintiffs of the various parties to the transactions in question. The transaction was that an agreement was entered into for the sale of certain property in extinguishment of the plaintiffs' claims. The agreement that was entered into by the contracting parties was this "We shall execute the sale deed for this as per your draft and give it to you registered within three months from this date" so that undoubtedly under that document it was part of the obligation of the defendants to get the deed that was in contemplation by this agreement drawn up and executed and registered. A deed was drawn up and in due course it came to the stage of registration. One of the persons who executed the agreement, the 3rd defendant in this case, when the time came for registration objected to the registration of the document and the Registration authorities after an enquiry into the matter refused to order registration of the document as against the recalcitrant 3rd defendant, plaintiffs' case of course being throughout that she was a person against whom the deed ought to have been registered and that is their case here to-day and that the Registration authorities were in error in giving effect to her refusal. In these circumstances they brought this suit for specific performance of the agreement against all the parties to it. We are not really called upon to decide in this case whether this is a matter in which the contemplation of the parties was that all should sign or that the signature of what I may call the operative persons should be regarded as sufficient, it apparently being the fact that the signatures of others including the recalcitrant 3rd defendant were added as if it were *ex majori cautela* in case they should raise objections and claims thereafter. Speaking for myself, I think that even in such a case it must most probably be held that it was the intention that they should execute for the very purpose that I have mentioned.

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However, in the view that we take it is unnecessary to decide the matter. And if the other view were to prevail that the signature of this person was *otiose* and unnecessary, then of course the plaintiffs' case would fail equally because the whole agreement would be completed sufficiently to satisfy the contract and there would be nothing for the suit to operate upon. But taking it that the signature of the 3rd defendant was necessary, what is the position in law?

By S. 77 (1) of the Registration Act it is enacted as follows:—

"Where the Registrar refuses to order the document to be registered, any person claiming under such document may within 30 days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office."

That is a statutory remedy given to a person who stands in the position that he is entitled to have a document registered by somebody else, that that somebody else has refused and the Registrar has upheld the refusal and he wants to have that compulsorily registered as against the other person. It should be observed, and I think this is a most important thing to notice about the section, that it provides a limitation of a short period of 30 days, the object no doubt being to ensure that matters of this kind should be gone into when the evidence is fresh in everybody's mind and in all human probability all of it available, whereas if left to an ordinary suit some people might be dead who could throw light on the matter and others might have let it fade from their recollection. I should have thought that looking at the statute alone it is clear that the object of the legislature was to provide a remedy of a very short period of limitation for putting right a wrongful refusal to register, and that must be held to be the remedy and the only remedy given by law. But unfortunately the matter is covered with conflicting authority. The authorities in Madras appear to differ from the authorities in other parts of India. In a matter which is open to divergence of view my opinion is that this Court should follow its own *cursus curiea* unless it is of opinion that the former decisions of the Court are clearly wrong. I do not think, if it agrees with those decisions, that it ought to harass the parties with any argument before a Full Bench merely because of different views in other Courts.

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An authority which is directly in favour of the respondents is *Amer Chand* v. *Nattu* (1) a decision to which that very distinguished Judge Stanley, C. J. was a party. A sale deed was executed, a lady refused to register it but no suit was brought for compulsory registration; nevertheless it was held that the plaintiff was entitled to a remedy by way of specific performance; and the learned Judge says this :—

"His (plaintiff's) grounds of appeal are that the substantial relief sought by him was the specific performance of the contract for sale and for possession of the property. We see no answer to this appeal. No defence to the action was disclosed by the defendants and in view of all the facts the Court of First Instance as well as the Lower Appellate Court ought, in our opinion, to have granted a decree for specific performance. The Court of First Instance was wrong in passing an order (that is no doubt true) for registration of the sale deed which was executed by the guardian of the defendants in view of the provisions of the Registration Act. But it appears to us that the Court has jurisdiction to direct performance of the contract and to require that the defendants should do all necessary acts for the purpose of fulfilling the obligation into which through their guardian they had entered, and that the plaintiff is entitled to have a fresh sale deed executed by all necessary parties and to have the document so executed registered."

And then they quote *Chinna Krishna Reddi* v. *Doraiswami Reddi* (2) a case which I shall show presently is really no authority for the proposition laid down by the Allahabad High Court at all. The next direct authority in Mr. Lakshmanna's favour is a case in *Surendranath Nag Chowdhury* v. *Gopal Chunder Gosh* (3) a decison of Mukerjee and Carnduff, JJ. There the decision was that—

"Although a document, which has been executed, is inoperative in law and wholly ineffectual to create title in the intended lessee, it is nevertheless evidence of a valid agreement to execute a lease and may consequently form the foundation of an action for specific performance."

That really entails another doctrine as well as the one we are directly concerned with here, namely, that though a lease has for some reason or other become, or was from the first, legally inoperative, yet for the purpose of bringing a suit for specific performance it is open to the Court to treat it as a mere agreement of lease. I should have thought it a very vicious method of construction to say that a document, which purports to be one thing, is to be allowed to be treated when it is found imperfectly to contain what it purports to be as a valid document of a different order altogether. The reason-

1. (1910) 7 A L J 887. 2. (1886) I L R 20 M 19.
3. (1910) 12 C L J 464.

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ing of the learned Judges of the Calcutta High Court appears to be this. The undertaking of a person who enters into a contract for the sale of real property is to do every thing whereby an operative agreement in law can be effected. He has not done everything if he failed in an instrument where the obligation is cast upon him to obtain its registration and, therefore, a step in the creation of the legal relation of purchaser and vendor being wanting, you can compel the person who has not taken that step to take it. The answer appears to me to be very simple. S. 77 of the Registration Act not only tells you how you are to do that, but says that if you want to effect that purpose of having registration forcibly carried out by a decree of the Court, you must do it within thirty days. It seems to me that these decisions in Calcutta and Allahabad in effect taken upon themselves by a side wind to get rid of the period of limitation strictly imposed by the express words of the statute. To my mind no judicial decision has any right to tamper with a thing directly enforced and enjoined by a statute whose construction is free from possible doubt. The most that can be said is that the remedy given by the statute is not intended to be the only one. It is almost impossible to believe that the legislature can have intended that there should be a direct and an indirect way of effecting the same thing and that the period of limitation applicable to them should be entirely different. That is the view that has been taken in more than one case in this Court. But before I deal with them I want to refer to one other case of the Calcutta High Court, *Nasiruddin Midda* v. *Sidhoo Mia* (4), because that is an instructive case. What appears to me to be the policy underlying the Calcutta trend of decisions is I think well illustrated by that case decided by Mookerjee and Beachcroft, JJ., in 1917. In that case the plaintiff claimed two things in the alternative. He first put in a claim asking in terms to have the registration of a document enforced and an alternative claim along with it for specific performance. The document was in the same stage as the document here. It had been executed but one of the parties had refused to acknowledge the right to have it registered. The learned Judges say this:—

"As regards the claim to enforce registration of the document executed in his favour by his vendors he was, no doubt, bound to follow strictly the procedure prescribed by the Indian Registration Act before he could institute a

4. (1917) 44 I C 361.

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suit under S. 77 to compel registration. But as regards the alternative claim to enforce specific performance of the agreement to sell there was really no answer to the suit. Although the vendors had executed the document, they could not be deemed to have completely performed their part of the agreement. The agreement in essence was not merely to execute a conveyance which until registered would be inoperative in law but to transfer the full title from themselves to the plaintiff as purchaser. Such title could be transferred only by means of a registered instrument; consequently the execution of the conveyance not followed by registration could not be regarded as fulfilment of the contract."

So that what is taken away by the right hand is immediately replaced by the left and where the statute has forbidden by a special means another means is promptly devised in order to get round the words of the Act.

In Madras the decisions have been different and having considered them all I am of opinion that they are quite consistent. The leading case and the most direct authority is *Venkataswami* v. *Kristayya* (5). There the plaintiff sued for specific performance and a decree had been passed in the Lower Court directing the defendant to execute and registered a deed of transfer. That judgment was upset by Muthuswami Aiyar and Handley, JJ., and the reasoning that is directly in point is to be found on the second page of the judgment. It is an interesting case because the judgment contemplates the case not merely of failure by the defendant to procure registration but the case where the plaintiff does not assume the remedy given him under S. 72 or S. 76. The learned Judges say this :—

"If defendant had appeared and admitted execution, the document would have been registered. If he had appeared and denied execution, registration would have been refused and plaintiff would have been entitled to an enquiry before the Registrar under Ss. 73 to 76. If defendant did not appear, plaintiff might have proved execution of the document, and on such proof would have been entitled to registration. If the registering officer was not satisfied with the evidence of execution and refused to register, an appeal would have lain to the Registrar under S. 72. If the decision under S. 72 or S. 76 had been adverse to plaintiff, he would have a remedy by suit under S. 77 of the Act. Plaintiff had, therefore, a complete remedy under the Act, and not having chosen to follow it, has only himself to blame that the efficacy of the document has not been completed by registration."

Then they go on to dispose of the other doctrine that you can treat an incomplete conveyance as a complete agreement for a conveyance and negative that. The learned vakil who appeared for the respondents in this case said

5. (1893) I L R 16 M 341: 3 M L J 169.

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"There is a distinction. The plaintiff was disentitled there because it was through his own negligence that he failed to get the document registered." I may point out in passing that in terms part of that negligence was considered by the learned Judges to be his failure to adopt the remedy given him under the Registration Act including the remedy by suit under S. 77. But says Mr. Lakshmanna, "If you look at some of the later cases you will find that a distinction is drawn and you find that in cases where it has been proved that the defendant was the person to blame, the remedy by the Specific Relief Act has been allowed." When examined, those cases appear to me not in the least to support his contention. In *Chinna Krishna Reddi* v. *Doraiswami Reddi* (2) there had been a document of conveyance executed but before registration the defendant in the suit got hold of the document fraudulently, stole it from the plaintiff and concealed it for the purpose of preventing registration from taking place because obviously the Registrar cannot register a document which for his purpose is non-existent, and therefore the learned Judges say that the plaintiff was clearly entitled to have a fresh document executed and registered just as he would be so entitled if after execution the document had been accidentally lost or destroyed. That no doubt is quite true. And it follows a much older decision of this High Court in *Nynakka Rowthen* v. *Vavana Mahomed Naina Rowthen* (6). In that case soon after execution the document in question was destroyed by fire before it had been registered. It was held that the plaintiff was entitled to ask the Court to compel the defendant to execute a fresh document. The principle of the decisions in the last two cases is perfectly intelligible and sound but that does not appear to me to touch the present case. Mr. Lakshmanna says: "All those were cases where it had been shown that the defendant was at fault. No doubt on his own showing the Court ought to give specific performance of a remedy for the plaintiff." It is not in my opinion the true line of reasoning at all. The plaintiff there was entitled to have a decree which no doubt included a direction that he should be given an executed and registered instrument because as things stood at the time of the suit he had nothing whatever to register. In the one case the document had been destroyed and in the other case it had been abstracted and he could not go to the Registrar and say, "Compel my conveyor to register a document in my favour," because the

2. (1886) I L R 20 M 19. 6. (1869) 5 M H C R 123.

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document to be registered was non-existing. The cases appear to have no bearing on this case. And it must be remembered that although in this country the remedy of specific performance is a statutory remedy, it nevertheless is simply a crystallisation into a statutory form of an equitable remedy to which laches was, as it is to all equitable claims, an answer. How it can be said that a man who was given an express statutory remedy by an Act of legislature under S. 77 of the Registration Act and has failed to take advantage of it has not been guilty of laches and is entirely free from blame passes my comprehension. It appears to me that a man who has failed to adopt the remedy expressly provided by the statute cannot come to this Court and ask for an exercise in his favour of a discretionary and equitable remedy. I ought to add that the decision in *Venkataswami* v. *Kristayya* (5) has been followed in several later decisions of this Court of which I need only instance two, *Thayarammal* v. *Lakshmi Ammal* (7) and *Subraya Pillai* v. *Devasahayam Pillai* (8). This is sufficient to dispose of this appeal, because it is not pretended that unless the respondent can get over this stile there is anything arguable in the appeal. That being so, the appeal must be allowed with costs of the 2nd defendant throughout and the suit dismissed.

The Memorandum of Objections is dismissed. No costs.

*Reily, J.* :—I entirely agree.

T. S. V. *Appeal allowed ; Memorandum of Objections dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE ODGERS.

Shanmugam Pillai ... *Appellant** (*1st defendant*)

*v.*

Panchali Ammal and others ... *Respondents* (*2nd plaintiff and defendants 2 and 6*).

Shanmugam Pillai v. Panchali Ammal.

*Limitation Act, Art. 11 (a)—Execution sale of item of joint family property in execution of decree against a member thereof—Purchaser at—Order under O. 21, R. 101, Civil Procedure Code dispossessing purchaser and delivering*

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*S A No. 751 of 1924. 28th October, 1925.

5. (1893) I L R 16 M 341: 3 M L J 169.

7. (1920) I L R 43 M 822: 39 M L J 181.

8. (1922) M W N 70.

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*possession of item to other members of family—Suit by purchaser for possession of item on ground of his exclusive title—Dismissal of—Subsequent suit by purchaser for partition of family properties and allotment to him of judgment-debtor's share—If barred under Art.* 11 (*a*) *of Limitation Act or S.* 11 *or O.* 2, *R.* 2 *of Civil Procedure Code.*

The suit house, which belonged to the joint family of one *R* and the 1st and the 2nd defendants, was attached in execution of a money decree obtained by *N* against *R*. *S* purchased the house at the sale held in execution of the said decree, and assigned his rights therein to *G*. After *G* got possession of the house, an order was passed on 7th September, 1915, under O. 21, R. 101, Civil Procedure Code redelivering the property to the possession of defendants 1 and 2. Within a year of the said order the plaintiff's husband instituted a suit for setting it aside and for a declaration that the defendants had no manner of right in the property. In that suit he asserted his right to have his title to actual possession of the house declared. That suit was finally dismissed in second appeal on the ground that *G* was not entitled to joint possession along with the other members of the joint family of the defendants.

Much more than one year after the order under O. 21, R. 101, Civil Procedure Code, dated 7th September, 1915, the widow of *G*, who had died in the interval, instituted the suit out of which the appeal arose, for partition by metes and bounds of a block of houses belonging to the joint family of the defendants and for delivery to the plaintiff of the share of the minor son of *R*, who had also died in the interval.

*Held*, that the suit was not barred by limitation under Art. 11 (*a*) of the Limitation Act, and that it was not barred by *res judicata* under S. 11 or O. 2, R. 2 of Civil Procedure Code.

Both in the claim proceedings and in the prior suit the plaintiff asserted his right to have his title to actual possession of the house declared; but, in the present suit, he asks for a partition, after allowing for good and bad qualities of the family properties and for delivery of a moiety to him. In making such a partition it is not necessary to go behind or re-open the decisions in the prior proceedings The plaintiff is only exercising the equitable right of the co-parcener whose share he has purchased to demand a partition at any time. Art. 11 (*a*) is thus not a bar to this suit. There is equally no bar of *res judicata* under S. 11 or O. 2, R. 2 because the cause of action in the prior suit was the order on the claim petition, while the cause of action in the present suit is plaintiff's purchase of the undivided share of a member of a joint family, and the reliefs asked for in the two suits are different.

Second Appeal against the decree of the Court of the Second Additional Subordinate Judge of Madura in A. S. No. 2 of 1924 (A. S. No. 27 of 1923, District Court, Madura) preferred against the decree of the Court of the District Munsif of Madura Town in O. S. No. 551 of 1920.

*P. R. Srinivasan* for appellant.

*C. A. Seshagiri Sastri* for respondents.

Shanmugam Pillai v. Panchali Ammal
Spencer, J.

The Court delivered the following

JUDGMENTS :—*Spencer, J.* :—The second plaintiff in the suit, who is the first respondent in this appeal, is the second wife of one Ganapathia Pillai (deceased), who was the assignee of the rights of one Sankararama Aiyar, auction-purchaser of a house which belonged to the joint family of one Ramalingam Pillai and the first and the second defendants and which was attached in execution of a money decree obtained by one Narayanaswami Aiyar against Ramalingam Pillai. The present suit is for partition by metes and bounds of a block of houses belonging to the joint family and for delivery to the plaintiff of the share of the minor son of Ramalingam Pillai, who is now dead. The question to be decided in second appeal is whether the suit is barred by reason of its having been instituted more than one year after an order which was passed on 7th September, 1915, under O. 21, R. 101 of the Civil Procedure Code re-delivering the property to the possession of defendants 1 and 2 after the plaintiff's husband had got possession in spite of their obstruction. Within a year of the order under R. 101 the plaintiff's husband brought a suit (O. S. No. 40 of 1916) for setting it aside and for a declaration that the defendants had no manner of right in these properties. That suit was finally dismissed by this Court in S. A. No. 707 of 1919 on the ground that the plaintiff was not entitled to joint possession along with the other members of the joint family of the defendants.

Additional arguments against the maintainability of this suit are based on defences arising out of S. 11, and O. 2, R. 2, Civil Procedure Code, in consequence of the prior suit of 1916 having been dismissed.

For establishing his contention that this suit is barred by limitation under Art. 11 (*a*) the appellant's vakil relies on *Ganpat Rai* v. *Husaini Begam* (1), *Bhimappa* v. *Irappa* (2), *Baldeo* v. *Kanhaiyalal* (3) and *Tilokchand* v. *Sada Ram* (4).

In *Ganpat Rai* v. *Husaini Begam* (1) the plaintiff's father was resisted in attempting in execution to get present possession of a house that he had purchased in Court auction and an order was passed against him. Eleven years later the plaintiff sued for separation and present possession of a two-fifths share of the same property by virtue of his purchase. Piggott, J. observed : "On the principle that the greater in-

1. (1920) I L R 19 A L J 53.
2. (1901) I L R 26 Bom 146.
3. (1920) 12 L W 408: 24 C W N 1001 (P C).
4. (1875) 7 N W P H C R 113.

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cludes the less, it seems reasonable to hold that the right now claimed to present possession over portion of the house is included in the right claimed in the year 1906 to present possession over the entire house so as to bring into operation the provisions of Art. 11 (*a*) of the Limitation Act schedule." He also observed that the order itself had very definitely referred the auction-purchaser to his remedy by way of a regular suit, yet he had put off availing himself of this remedy to rectify the adverse order passed against him for nearly twelve years.

This case can be distinguished from the one before us on the ground that the property there belonged to Mahomedans and that the plaintiff in the suit admitted that the judgment-debtor whose share he had purchased was the owner of a two-fifths share while the claim order negatived his rights to any portion of the house. A purchaser of the share of a sharer under Mahomedan Law is entitled to something more than a mere equity to partition of the joint family property, which is what the purchaser of the undivided share of a co-parcener in a Hindu family in Madras gets by his purchase. I do not see any occasion to regard this decision as directly opposed to *Yelumalai Chetti* v. *Srinivasa Chetti* (5), as Phillips, J. did recently in S. A. No. 1708 of 1922, a second appeal in which, as in this case, a question arose as to the right of a Court auction purchaser to enforce his right to an order for partition of joint family property more than one year after the dismissal of an application for delivery of possession. The principle established by *Yelumalai Chetti* v. *Srinivasa Chetti* (5) as I understand the decision is that an order for partition of joint family property cannot be passed in execution proceedings, and, therefore, a subsequent suit for that relief is not barred either by S. 47 (old S. 244) of the Civil Procedure Code or by failure to appeal against an order made under O. 21, R. 95 (old S. 318). The case does not deal with the application of any article of the Limitation Act.

In *Bhimappa* v. *Irappa* (2) a purchaser at a Court sale, having been obstructed, applied for removal of the obstruction and for possession, and his application was rejected. More than a year after the order passed against him he filed a suit praying that the order in the Miscellaneous Proceedings might be set aside and that a partition might be directed and that the whole of the plot of land which he purchased might be allotted

2. (1901). I L R 26 Bom 146. 5. (1906) I L R 29 M 294.

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to the share of his judgment-debtor and that he might be placed in present possession of it. Chandravarkar, J. remarked that his suit though in name a suit for partition, was in substance a suit for possession of that very property under the self-same right put forward without avail in the miscellaneous proceedings, and so it was a suit to establish his right to the same property covered by the order, and, having been brought more than a year after the date of the order in the miscellaneous proceedings which he asked to have set aside, it was barred. In considering how far we should be influenced by the ruling of the Bombay Court in such a matter we must remember that, as noticed by Mr. Mayne in paragraph 355 of his Hindu Law, "in Bombay it is held that even before partition the purchaser of the interest of one co-parcener is a tenant-in-common with the others ; but, in Madras, this view is not accepted, and it is held that the purchaser is not a tenant-in-common but has only an equity to enforce his rights by partition." To make this clear, it will be sufficient to refer to *Patil Hari Premji* v. *Hakam Chand* (6), *Naro Gopal* v. *Paraganda* (7), where it was laid down that an alienation by a joint tenant effects a severance, as a result of which the alienee —before division by metes and bounds becomes a tenant-in-common. But in *Kota Balabadra Patro* v. *Khetra Doss* (8), *Manjaya* v. *Shanmuga* (9) and *Maharajah of Bobbili* v *Venkataramanjulu Naidu* (10) it was held that a purchaser of a co-parcener's interest in the joint family property has not a common right to joint possession with the rest of the family nor is he a tenant-in-common ; but he has only an equity to compel a partition and to work out his rights against the heir that falls to him [*see* also *Subba Goundan* v. *Krishnamachari* (11)]. Here, as in other cases where the application of Art. 11 (*a*) of the Limitation Act is in question, the important thing is to see, as the Judicial Committee did in *Baldeo* v. *Kanhaiyalal* (3), what was asked for in the claim proceedings and what is asked for in the present suit. The law provides *ut sit finio litium* that a person defeated in claim proceedings shall not ask for the same relief that was denied him in those proceedings which are summary, except in a suit filed within

3. (1920) 12 L W 408: 24 C W N 1001 (P C).
6. (1884) I L R 10 Bom 363 at 366. 7. (1916) I L R 41 Bom 347 at 354 and 356.
8. (1916) 31 M L J 275.
9. (1913) I L R 38 M 684 at 692: 26 M L J 576.
10. (1914) I L R 39 M 265: 27 M L J 409.
11. (1921) I L R 45 M 449: 42 M L J 372.

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a year of the order. Under O. 21, R. 103, Civil Procedure Code, a party against whom an order for possession is made under R. 101 may institute a suit to establish his right to *present possession* of the property, but, on his failing to do so, the order becomes final.

From the fuller report of the Privy Council case of *Baldeo* v. *Kanhaiyalal* (3) it appears that the village which belonged to a joint family was on the death of the head of the family registered in the names of his two sons, and that the appellant both in his application for possession under R. 97 and in his suit asked for actual possession of the eight-annas share of one of the sons whose interest he purchased. Their Lordships observed that it was too clear for argument that on both occasions he asked for exactly the same relief, and his suit brought more than one year after the disposal of his claim was thus time-barred.

In *Tilokchand* v. *Sadaram* (4) which was a decision under the Civil Procedure Code of 1859 the plaintiff asserted in execution proceedings that there had been a partition and he claimed to recover one-fourth of certain immoveable property which had fallen by the partiton to his lot. Both at the time of the claim and at the time of the suit a right to present possession was asserted, and the suit being more than one year after his failure in the claim proceedings, was thus barred. The facts of the case before us are different. Both in the claim proceedings and in the prior suit, O. S. No. 407 of 1915 the plaintiff asserted his right to have his title to actual possession of the house declared; but, in the present suit, he asks for a partition, after allowing for good and bad qualities of the family properties and for delivery of a moiety to him. In making such a partition it is not necessary to go behind or re-open the decisions in the prior proceedings. The plaintiff is only exercising the equitable right of the co-parcener whose share he has purchased to demand a partition at any time. Art. 11 (*a*) is thus not a bar to this suit, and as the relief the plaintiff now asks for in a suit based on the cause of action of his purchase of the undivided share of a member of a joint family would be inconsistent with what he asked for in the prior suit, in which the cause of action was the order on the claim petition, there is equally no bar of *res judicata* under S. 11, Civil Procedure Code, or by O. 2, R. 2.

3. (1920) 12 L W 408: 24 C W N 1001 (P C).
4. (1875) 7 N W P H C R 113.

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Odgers, J.

The decrees of the Lower Courts are confirmed and the Second Appeal is dismissed with costs.

*Odgers, J.*—The facts are fully set out in the judgment of my learned brother and the only question of importance to be decided in the 2nd appeal is whether the present suit is barred under the provisions of Art. 11 (*a*) of the Limitation Act by reason of the order made against the plaintiff's husband (and son) on 7th September, 1915 (Ex. C), whereby possession of the suit house was redelivered to the defendants 1 and 2 under O. 21, Rr. 100 and 101, Civil Procedure Code. The plaintiff's husband then brought a suit on 8th September, 1915 (O. S. No. 407 of 1915) for a declaration that all the suit properties belonged to him and that defendants 1 and 2 had no right to the same and for cancellation of the Order of 7th September, 1915. The Munsif dismissed the suit but the Subordinate Judge held that plaintiff was entitled to retain possession of item 2 till the otti was redeemed and for joint possession of all other items with defendants 1 and 2. On second appeal (S. A. No. 707 of 1919) to this Court, Abdur Rahim and Oldfield, JJ., held that plaintiff was not entitled to get possession along with members of the family as being the purchaser of joint family property. They restored the decree of the Munsif. Now in the present suit the plaintiff asks for possession after partition. The simple question is, is this a different thing from what was asked for in the suit of 1915 as appears on the face of it or is it in fact the same thing so as to attract the limitation of one year under Art. 11 (*a*) of the Limitation Act.

Now a person who acquires the rights of a co-parcener of joint family property is not a person entitled to present possession, in other words, he does not become a tenant-in-common with the joint family. His only right is to obtain by partition the share to which his alienor is entitled. Cf. *Kota Balabaddra Patro* v. *Khetra Doss* (8) where the Court thought it unnecessary to discuss the rulings of the Bombay High Court and Seshagiri Aiyar, J., remarked in the course of the argument, that the law in Bombay is different. To the same effect is the decision in *Maharajah of Bobbili* v. *Venkataramanjulu Naidu* (10), see also *Subba Goundan* v. *Krishnamachari* (11) and the cases therein cited. The cases relied on by the appel-

8. (1916) 31 M L J 275.
10. (1914) I L R 39 M 265: 27 M L J 409.
11. (1921) I L R 45 M 449 at 462: 42 M L J 372.

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lant may be shortly referred to. In *Baldeo* v. *Kanhaiyalal* (3) there are indications that the property had become divided though this is not clear and the plea was raised that the appellant was not entitled to actual possession as purchaser in Court auction of eight-annas share of one of the sons. Their Lordships say this does not matter, the question being not what appellant might or ought to have asked but what he did ask. Viewed by this standard the present case seems to be outside the purview of the Privy Council decision. There the appellant twice asked for exactly the same relief. Here the plaintiff first asked for a declaration of his title and possession as against defendants 1 and 2 but in the present suit after setting out in para. 12 of the plaint that plaintiff and defendants 1 and 2 are each entitled to half the suit properties he asks for partition and delivery of his share. In my opinion these facts have only to be stated to put the present case outside the Privy Council decision. In *Ganpat Rai* v. *Husaini Begam* (1), the case was one between Muhammadans as to whom of course the doctrine of the Hindu Law set out above has no application. The purchaser of a share of a Muhamadan heir no doubt has a right to present possession after partition. In 1906 the plaintiff's father claimed the entire house. He then discovered that his vendor was only entitled to 2|5th of the house and asked to be put in possession. It was held that he had in effect asked for this before, when he was definitely referred to a suit and did not bring one till the last possible day. I do not think this case helps us. In *Bhimappa* v. *Irappa* (2), the suit was "both in form and in substance one for establishing plaintiff's right to and for the present possession of Survey No. 78" in which he had purchased the right title and interest of defendant 1 at a Court sale and as to which when he went to take possession he was obstructed. If the law in Bombay is that a purchaser of an undivided co-parcener's share is entitled to possession [as to which see *Patil Hari Premji* v. *Hakam Chand* (6), *Naro Gopal* v. *Paraganda* (7)] there is no doubt that the plaintiff here was asking for exactly the same thing in the suit as he asked for in the summary proceedings. I very much doubt if the case is useful as a guide.

In *Tilokchand* v. *Sada Ram* (4) was a case under S. 246 of Act VIII of 1859 which corresponds to the present O. 21,

1. (1920) I L R 19 A L J 53.
2. (1901) I L R 26 Bom 146.
3. (1920) 12 L W 408: 24 C W N 1001 (P C).
4. (1875) 7 N W P H C R 113.
6. (1884) I L R 10 Bom 363.
7. (1916) I L R 41 Bom 347.

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R. 58, the claims section. There was no question of present possession and I think this case affords no help.

In *Yelumalai Chetty* v. *Srinivasa Chetty* (5) it was held that as the only right acquired by Court sale against the 2nd defendant, whose undivided half share had been purchased by plaintiffs, was to effectuate the sale by a suit for partition of the joint property of the co-parceners, it was not competent to the Court, on a mere application for execution by the purchaser to enforce purchaser's right by an order for partition. So that present S. 47 could not be a bar to plaintiff's suit for partition. The question of Art. 11 (*a*) did not arise in this case.

A recent ruling of Phillips, J., in S. A. No. 1708 of 1922 has been cited to us in which he held that *Yelumalai Chetty* v. *Srinivasa Chetty* (5) is directly opposed to *Ganpat Rai* v. *Husaini Begam* (1). With respect, I think if we bear in mind that the latter case had to do with Mahomedans who are tenants-in-common whereas *Yelumalai Chetty* v. *Srinivasa Chetty* (5) had to do with alienation of an undivided share of a Hindu co-parcener the opposition disappears as the case do not really relate to the same doctrine at all. The authority *Yelumalai Chetty* v. *Srinivasa Chetty* (5) can be accepted without in the least diminishing the weight of the argument adduced for the respondent in this case.

I have examined the authorities adduced for the appellant on this point at some length as the issue is of importance. I agree with my learned brother that they do not enable or compel us to say that the view of the Lower Appellate Court is wrong. I agree with my learned brother as to the other points raised and that this appeal must be dismissed with costs.

A. S. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS AND MR. JUSTICE VISWANATHA SASTRI.

Vemulapalli Seetharamamma and others ... *Appellants** (*Defendants 1 to 5*)

*v.*

Maganti Appiah and another ... *Respondents* (*Plaintiff and 6th defendant*).

Vemulapalli Seetharamamma *v.* Maganti Appiah

*Hindu Law—Minor—Guardian* de facto *of—Alienation by—Powers of—Alienation not for necessity—Void or voidable—Ratification by minor on attaining age—Effect.*

*S A No. 444 of 1923. 6th October, 1925.

5. (1906) I L R 29 M 294. 1. (1920) I L R 19 A L J 53.

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The powers of a *de facto* guardian of a Hindu minor, who is neither the *de jure* nor the natural guardian of the said minor, are similar to those of a *de jure* or a natural guardian of the minor. An alienation of the minor's property by such a *de facto* guardian is valid and binding upon the minor if it has been made honestly, for the purpose of saving the estate of the minor or for the benefit of the minor's estate. A transaction entered into by such a *de facto* guardian not for necessity is only voidable, and can therefore be ratified by the minor on attaining his age.

*Held*, so in the case of an alienation of a Hindu minor's property by his natural uncle who was his *de facto*, but neither his *de jure* nor natural guardian.

Second appeal against the decree of the Court of the Subordinate Judge of Masulipatam in A. S. No. 7 of 1922 (A. S. No. 104 of 1921, District Court, Kistna) preferred against the decree of the Court of the Principal District Munsif of Gudivada in O. S. No. 151 of 1919.

*K. Subba Rao* for *V. Ramadoss* for appellants.

*P. Satyanarayana Rao* for respondents.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—The question in this case is whether an alienation by a *de facto* guardian is valid under the Hindu Law. The person in question is the maternal uncle of the plaintiff and of course is neither the natural nor the legal guardian. The District Munsif dismissed the suit which was a claim for a declaration that the alienation made during the minority of the plaintiff did not bind him. The Subordinate Judge reversed this decision holding that the alienation made by the maternal uncle was a void transaction.

It has been argued at length for the respondents that a *de facto* guardian is unrecognised in the Hindu Law. It may be at once said that, if there is such a recognition I am satisfied that the recognition is more or less modern and possibly, to some extent, the recognition, if it is legally recognised at all, has come about by necessity. The earliest case, as far as I know is the well-known case in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Kunweree* (1) where their Lordships of the Privy Council say: "Upon the third point it is to be observed that under the Hindu Law, the right, of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honesty, for the purpose of saving the estate or for the benefit of an estate is not (provided the circumstance would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union

1. (1856) 6 M I A 393.

of the *de facto* with the *de jure*." It has been said that this dictum is obiter as the Rani in the case under discussion was undoubtedly the natural guardian. It might perhaps also be said that the 3rd point was not absolutely essential to the decision. However, that may be, any *dicta* that may fall from the Privy Council are naturally entitled to great weight and, if the powers of a *de facto* guardian under the Hindu Law have been recognised in other decisions, it must, I think, be taken that a *de facto* guardian is known to that Law. Much stress has been laid for the respondents on the Privy Council case in *Imambandi* v. *Mutsaddi* (2) where it is clearly laid down that a *de facto* guardian is unknown in the Mahomedan Law. The decision of the Courts on this point of Mahomedan Law are fully examined and, in their Lordships' judgment delivered by Mr. Ameer Ali, a person who may be conveniently called a *de facto* guardian has no power under the Mahomedan Law to convey to another any right or interest in immoveable property which the transferee can enforce against the infant. Nothing can be clearer than that. But it has to be observed that not only there but all through the judgment only the question as arising under the Mahomedan Law is dealt with. On the other hand, in Gour's Hindu Code, S. 906, it is asserted that the powers of a natural and *de jure* guardian are the same as those of a legal guardian. Any act done by the *de facto* guardian would be equally binding on the minor if it is supported by necessity or benefit to the minor. See also S. 913 where the learned author expressly states that the Mahomedan Law is different.

In *Mohanund Mondal* v. *Nafur Mondul* (3), a grandmother purported to sell a minor's estate. The Court found that she was a *de facto* guardian, and, relying on *Hanoomanpersaud Panday* v. *Mt. Babooee Munraj Kunweree* (1) it held that not only might a *de facto* guardian mortgage but also sell. Bannerji, J. points out that there may be cases where the sale of a part of the minor's estate might be more beneficial to him than a mortgage. In *Adhar Chandra Dutta* v. *Kirtibash Bairagee* (4) it is said in the judgment: "It is conceded by the learned Doctor who appeared for the appellants that the powers of a *de facto* guardian are the same as those of a legal guardian." It

1. (1856) 6 M I A 393.
2. (1918) I L R 45 C 878: 35 M L J 422 (P C).
3. (1899) I L R 26 C 820.
4. (1910) 12 C L J 586.

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appears that the Court adopted that admission which was that of Dr. Rash Behari Ghose. In *Bai Amrit* v. *Bai Manik* (5) which is a case of a transaction by the mother as guardian of her son and of her minor daughter-in-law, she would of course be the natural guardian of the son, but the case is treated as if she was the manager *de facto* of the family, any sales for valuable consideration the proceeds of which were applied to meet the family necessities were held to be unquestionable. *Nathuram* v. *Shoma Chhagan* (6) was a case of the father's cousin taking charge of a minor and borrowing money to meet the funeral expenses of the deceased father. It was held that he had sufficient authority to bind the minor by a loan if it were necessary. Sadasiva Aiyar, J. in *Vembu Aiyar* v. *Srinivasa Aiyangar* (7) citing *Hunoomanpersaul Panday* v. *Mussumat Babooee Munraj Kunweree* (1) says that, when the act is done by the person who is not the guardian but who is the manager of the estate in which the minor is interested, the latter will equally be bound if under the circumstances the step taken was necessary, proper or prudent.

On the other hand, no case has been cited, except possibly one, which lays down that a *de facto* guardian has no power to deal with the property of a minor for necessity. On the other hand in *Arunachela Reddi* v. *Chidambara Reddi* (8) it is said : "It is well settled that an alienation may be validly made by a *de facto* guardian (assuming of course the necessity)." It is true that there the guardian in question was a natural guardian. But, in my view, having regard to the authorities I have cited, that can make no difference.

*Arumugam Chetti* v. *Duraisinga Tevar* (9) which was referred to by the learned vakil for the respondents, merely lays down that, once a guardian has been appointed by the Court, the rights of the natural guardian are extinguished. It will be noticed at page 41 the learned Judges say that there is no proof that the 1st defendant's mother was the *de facto* guardian. In *Gopi Ram* v. *Jeot Ram* (10) the mother did not mortgage the property on behalf of her son and no question of necessity arose. *Mata Din* v. *Ahmad Ali* (11) is again, like *Imambandi* v. *Mutsaddi* (2), a case

1. (1856) 6 M I A 393 at 412.
2. (1918) I L R 45 C 878: 35 M L J 422 (P C).
5. (1875) 12 Bom H C R 79 at p. 81.
6. (1890) I L R 14 Bom 562.
7. (1912) 23 M L J 638 at 646.
8. (1902) 13 M L J 223.
9. (1911) I L R 37 M 38.
10. (1923) I L R 45 A 478.
11. (1911) I L R 34 A 213: 23 M L J 6 (P C).

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under the Mahomedan Law. The family were Mahomedans and were governed by the Mahomedan Law relating to guardianship. It is pointed out by their Lordships that the question was whether, according to Mahomedan Law, a sale by a *de facto* guardian if made for necessity..........and if beneficial to the minor, is altogether void or merely voidable: but it was unnecessary to decide the question as the appellant had not shown that the sale was for necessity or was beneficial to the minor. Reliance is also placed for the respondent on a remark of Sadasiva Aiyar J. in *Thayammal* v. *Kuppanna Koundan* (12) that nobody else than the father and the mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled, as a matter of natural right, to be and to act as a guardian of a minor's person and property. Recourse must be had to the Court (representing the rights of the king which are paramount to even the rights of the parents where there is no natural guardian alive. I am unable to see how this helps the respondent in the present case as the relation in question was the maternal uncle, who is therefore a direct male ancestor of the minor. The decision was that the paternal aunt was not a natural guardian. A decision much relied on is *Narayanan Nambudri* v. *Ravunni Nair* (13) by a single Judge of this Court where in the case of a Nambudri illom, the step-mother of the minors, who was managing the household and looking after them, borrowed money, for necessity. On the assumption that the parties were *prima facie* governed by Hindu Law and that no special custom had been set up in the pleadings it was held that the step-mother had no legal authority. The learned Judge said: "It is not contended that the *de facto* guardianship gave her, *i. e.,* the step mother, any right to mortgage the estate." With great deference I am unable to see first how the dictum applies to the facts of this case and secondly, if necessary, I would take leave to say that if the parties were governed by the Hindu Law, I should have thought it might have been well contended that the mortgage, if for necessity, could be upheld.

The Court below has found that, as to one of the sale evidenced by Ex. IV, which is the only one in question before us, there was necessity to the extent of Rs. 275 out of a total consideration for Rs. 400. It is said by the appellants that

12. (1914) I L R 38 M 1125: 27 M L J 132.
13. (1924) 47 M L J 686.

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there has been a ratification by Ex. III by the minor on attaining his age of this alienation by his *de facto* guardian. On the other hand, it is said that any alienation not for necessity is void and not voidable and as there can be no ratification of a void transaction it is of no effect in this case. It is, I think, clear that an alienation by a *de jure guardian* or a natural guardian is voidable and, as I am inclined to hold the powers of these guardians are similar, I think a transaction entered into by a *de facto* guardian not for necessity is only voidable and therefore can be ratified by the minor on attaining his age. In *Chetty Colum Comara Venkatachella Reddiar* v. *Rajah Rungaswami Aiyangar Bahadur* (14) the minor recognised a transaction made during his minority by his adoptive mother and guardian. This was upheld without determining the question as to the power of a Hindu widow as guardian to create a charge during the minority of the minor son.

Further, it is said that this suit is barred by limitation. The sale is dated 28th February, 1907. The suit was brought on the 1st March, 1919 which is admittedly the last day of the 12 years allowed. But it is said in the letter, Ex. III, that the transferee had had possession delivered to him some time before the date of the sale deed. The words which have been retranslated are, "whether before the delivery of possession to you in pursuance of the sale *before now or after.*" The words 'before now' are indefinite, but they might refer to possession being given on the same day. There is further some contention on the other side that these persons were already in possession as tenants. However, that may be, the matter is much too indefinite for us to attach the slightest weight to those words. I therefore think that this point fails. This question of limitation, though dealt with by the District Munsif and found in favour of the defendants, was not considered by the learned Subordinate Judge. In my view, there is nothing in the point.

I think the learned Subordinate Judge is wrong in holding that the alienation made by the *de facto* guardian is a void transaction. In my view, the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Viswanatha Sastri, J.

*Viswanatha Sastri, J*:—Defendants 1 to 5 are the appellants. The suit was for a declaration that the alienation made by plaintiff's maternal uncle during his minority were not binding on him, and for recovery of the items alienated.

14. (1861) 8 M I A 319.

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Viswanatha Sastri, J.

The alienations were made under two sale deeds of the dates 28th February, 1907 (Ex. IV) and 7th October, 1913, and the suit was instituted (it was said on the last day of limitation) in 1919. The District Munsif dismissed the suit: and on appeal the Subordinate Judge gave plaintiff a decree for possession. The contentions urged in Second Appeal are:

(1) That the alienations by way of sale, by the maternal uncle who was not the *de jure* guardian of plaintiff were void, and

(2) That the suit was barred by limitation with respect to the items covered by Ex. IV, as defendants were placed in possession prior to the date of Ex. IV. The Second Appeal first came on for hearing before Ramesam, J., who referred it to a Bench "as the matter (which forms the subject matter of the first contention) was not concluded by authority so far as the Hindu Law is concerned."

It was argued before us that under the Hindu Law, the father, the mother, and failing them the king, were the guardians of an infant; that no other relation was the guardian; that *de facto* guardians were no better than inter meddlers; and that alienations by *de facto* guardians were void as was laid down by the Privy Council in *Imambandi* v. *Mutsaddi* (2). That case related to a Mahomedan minor; their Lordships based their decision on Mahomedan Law Texts; and so far as I am able to see, I do not find reference in the judgment to any decided cases concerning Hindu minor. Alienations by the *de facto* guardians of Hindu minors have come up very frequently before Courts, and our attention has not been directed to any decided case in which it has been held that such an alienation was *per se* void, apart from any question as to whether it was for legal necessity or not. It was said that this may be due to the fact that the point was not raised in those cases, but, as observed by Maclean, C. J., in *Mohanund Mondul* v. *Nafur Mondul* (3) "the absence of judicial authority suggests that the point has not been regarded as open to serious argument."

So far as Hindu Law goes, it appears to me that there is nothing in it which limits guardianship only to the father, the mother, and failing them the king. Macnaughten in his Principles and Precedents of Hindu Law says, that in default of the father and mother, "an elder brother of a minor is

2. (1918) I L R 45 C 878: 35 M L J 422 (P C).
3. (1899) I L R 26 C 820 at 822.

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competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relations, the office devolves on the maternal kinsman, according to their degree of proximity, but the appointment of guardian universally rests with the ruling power." [*See* Volume I, pages 103, 104] And in Volume II (Precedents) case III at page 204 gives the opinion of pundits based on the authority of the Dayabhaga Dayatatwa, Dayakrama Samgraha that the husband's sister's son is the guardian of a childless widow who is a minor. It was said that in the absence of the father and mother, "recourse must be had to the Court (representing the rights of the King which are paramount to even the rights of the parents where there is no natural guardian alive"; as observed by Sadasiva Aiyar, J. in *Thayammal* v. *Kuppanna Koundan* (12). But it must be remembered that the learned Judge in the previous sentence includes among natural guardians the elder brother and the direct male and female ancestors of the minor, although according to respondent's vakil, they would not be the natural guardians under Hindu Law. Applications to Courts can only be made under the Guardian and Wards Act, and it has been held by a Full Bench of the Calcutta High Court in *Ramachandra Chuckerbutty* v. *Brojonath Mozumdar* (15), that this Act would not affect or alter any provision of Hindu Law as to guardians who do not avail themselves of the Act. It is true that in that case the person who acted as guardian of the minor was the mother; but this circumstance would not in my opinion make any difference.

Coming to decided cases, it was held in *Mohanund Mondul* v. *Nafur Mondul* (3) on the authority of the Privy Council case in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) that a sale by a *de facto* guardian (it was the grand mother), in case of necessity, was valid. And in *Arunachella Reddi* v. *Chidambara Reddi* (8) White, C. J. and Benson, J. held that "it is well settled that an alienation may be validly made by a *de facto* guardian (assuming of course necessity)." In *Ganjayya* v. *Ramaswami* (16) it was held that the natural mother was a "lawful guardian" for the purpose of S. 21 of the Limitation Act, even though there was a testamentary guardian named in

1. (1856) 6 M I A 412. 3. (1899) I L R 26 C 820.
8. (1902) 13 M L J 223.
12. (1914) I L R 38 M 1125 at 1126: 27 M L J 132.
15. (1879) I L R 4 C 929 (F B). 16. (1913) 24 M L J 428.

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the will of the adoptive father who was unwilling to act. In *Nathuram* v. *Shoma Chhagan* (17) a debt contracted by the father's cousin for necessary purposes was held to bind the minor. Although it is no authority in the sense of its being a judicial decision, I may state that in *Adhar Chandra Dutta* v. *Kirtibash Bairage* (4) such an eminent lawyer as Dr. Rash Behari Ghosh conceded the powers of a *de facto* guardian (of a Hindu) were the same as those of a *de jure* guardian. Our attention was drawn to the observations of Sadasiva Aiyar, J. *Thayammal* v. *Kuppanna Goundar* (12) wherein the learned Judge holds that "Under the Hindu Law, nobody else than the father and mother of a minor (with probable exception in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to act as guardian of his person and property." In that case the alienation by the paternal aunt was found to be "for no necessity" and the second appeal could have been decided only on this finding without considering the question whether she was a natural guardian under Hindu Law. I may also state that the probable exceptions which the learned Judge recognises, supports the view that guardianship under the Hindu Law is not confined only to the father, mother, and the king, as contended for by respondent's vakil. The learned Judge relies on the decisions of the Calcutta High Court, *Kristo Kissor Neoghy* v. *Kadermoyee Dossee* (18) and *Musammat Bhikno Koer* v. *Musammat Chamela Koer* (19) in support of his view. They were both cases in which the Court was moved to appoint a guardian, and there was no question as to the binding nature of an alienation made by *de facto* guardian. It may here be stated that the case in *Mohanund Mondul* v. *Nafur Mondul* (3) is referred to with approval by Sadasiva Aiyar, J. in *Vembu Aiyar* v. *Srinivasa Aiyangar* (7). Reference was made to a case in *Narayanan Nambudri* v. *Ravunni Nair* (13) when a single Judge of the Court held that a *de facto* guardian of a Hindu Nambudri minor (a step-mother) was no better than an inter meddler, and had no right to represent a minor. It does not appear that any of the cases referred to were brought to the notice of the learned Judge.

3. (1899) I L R 26 C 820. 4. (1910) 12 C L J 586.
7. (1912) 23 M L J 638 at 646.
12. (1914) I L R 38 M 1125: 27 M L J 132.
13. (1924) 47 M L J 686. 17. (1890) I L R 14 Bom 562.
18. (1878) 2 C L R 583. 19. (1897) 2 C W N 191.

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Decisions under the Mahomedan Law have no bearing on the present question; and I am clearly of opinion that the right of a *de facto* guardian to deal with the property of a Hindu minor has been recognised by our Courts ever since the decision of the Privy Council in *Hanuman Persaud Panday* v. *Musammat Babooee Munraj Kunweree* (1), provided the alienation was for necessity.

I may here state that in the present case the *de facto* guardian was the maternal uncle who took charge of the minor after his mother's death; and the evidence of D. W. 1 is to the effect that the paternal aunt with whom the minor was for a time was not in a position to maintain herself. So far as Hindu society in South India goes, the maternal uncle is treated as the closest relation of a person, next to his father and mother; and at all ceremonies at which presents are given, it is his that is first handed over.

Appellant's vakil next contended that the alienations now sought to be set aside were ratified by plaintiff; and that they were therefore valid, apart from any question of the maternal uncle being only the *de facto* guardian. Exs. II and III are two letters passed on by plaintiff to the *vendees* on 9th November, 1918, wherein he approved of the sale deeds of the dates 7th October, 1913 and 1st March, 1907. That such a ratification would make the alienation binding will be clear from the decision in *Chetti Colum Comara Venkatachella Reddiar* v. *Rajah Rungaswamy Aiyangar Bahadur* (14).

It was also urged before us that so far as the alienation under Ex. IV went, the suit was barred by limitation, as possession was, as stated in it, given before its date (28th February, 1907); that the evidence was that it was given during the previous cultivation season (August, 1906); and that time ran from August, 1906. The question under Art. 144 of the Limitation Act would be when the possession became adverse to the plaintiff. The District Munsif held that it became adverse when possession was given, but the Subordinate Judge did not consider this question. Since possession was given in view of a contemplated sale, it cannot be said that it became adverse to the vendor from the date it was given in case the sale was held not binding on the minor.

The sale to the father of defendants 1 to 3 has been found by both Courts to be binding to the extent of Rs. 275, and the sale to the 5th defendant has been held to be wholly

1. (1856) 6 M I A 393. 14. (1861) 8 M I A 319.

binding. In my view the effect of the ratification evidenced by Ex. III is to make the sale to the father of defendants 1 to 3 wholly binding on plaintiff.

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I would therefore allow the appeal, and reversing the decree of the Court below, dismiss the suit with costs throughout.

A. S. V. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE SRINIVASA AIYANGAR.

The Secretary of State for India in Council represented by the Collector of Kistna, Masulipatam ... *Appellant** (*Defendant*)

*v.*

Mahaboob Sir Frazvant Sri Raja Parthasarathy Appa Rao Savai Aswarao Bahadur Zamindar Garu and others ... *Respondents* (*Plaintiffs*).

Secretary of State for India v. Parthasarathy Appa Rao.

*Sannad by East India Company, Ltd., dated* 1843, *granting village—Grantee's title to village resting upon grant or on a family settlement between different branches of his family—Evidence—Clause is sannad restraining alienation without consent of Government previously obtained—Validity—Crown Grants Act—Applicability to grants before* 1876 *or* 1882*—Nature of Act, declaratory or enacting—Act not* ultra vires *of Indian Legislature—East India Company—Grant by—If grant on behalf of Crown—Crown—Grant by, containing clause restraining alienation—Power to make, before Transfer of Property Act—Estate inalienable in its nature—If unknown to law—Madras Regulation (XXV of* 1802)*—Sannads to which applicable.*

The suit village was granted to the ancestors of the plaintiffs by a sannad issued by the Government on 2nd May. 1843. The grant contained a clause imposing a restriction on the right of alienation, no transfer of the village being valid unless the previous consent of the Government had been obtained authorising the transfer.

The plaintiffs agreed to sell the property and the proposed vendee, having regard to the clause restraining alienation, desired them to obtain the consent of the Government to the sale. The plaintiffs accordingly applied to the Government for the requisite consent, but the Government declined to grant it. Thereupon the plaintiffs instituted the suit out of which the appeal arose against the Secretary of State, alleging that the village, though it was nominally granted by the Government, was really acquired by the plaintiffs' ancestors as a result of a family settlement between their branch and the other branches of their family, the Government merely acting as mediators in the matter. The

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*Appeal No. 142 of 1921. 28th August, 1925.

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plaintiffs urged that in any event the clause in question imposing a restraint on alienation was void.

*Held,* on the facts, reversing the Court below, that the village in question was at the time of the sannad property which had reverted to the Government and become vested in it, so as to be capable of being disposed of by the Government at their pleasure, that it was by reason of the grant that the ancestors of the plaintiffs acquired the village, and that the source of their title was not a family settlement between the then representatives of the different branches of their family.

*Held further,* that the grant was a grant by the Crown and that the clause in it imposing a restraint upon alienation was not void.

Per *Venkatasubba Rao, J.*:—A grant made by the East India Company should be deemed to have been made on behalf of the Crown.

The Crown Grants Act was not intended to apply only to grants subsequent to 1876 when the title of "The Queen Empress" was assumed by Her Majesty.

The Crown Grants Act is not *ultra vires* of the Indian Legislature.

Madras Regulation XXV of 1802 does not apply to the sannad in question, because (1) there was no permanent assessment of the land revenue, no revenue having been imposed at all in regard to the grant in question, (2) the Government did not purport to act under the Regulation nor was the intention of the parties that the sannad should be issued under it, and (3) the form of the grant was not that prescribed for sannads under the Regulation. The fact that the sannad was granted after the date of the Regulation did not necessarily make it a sannad issued under the Regulation, and the mere use of the words "Sannad-i-milkiyat-i-istimrar" did not show that the Regulation governed the sannad. The clause was therefore not invalid as contravening the provisions of S. 8 of the said Regulation.

Per *Srinivasa Aiyangar, J.*:—The Government was under no obligation not to exercise its discretion in the matter of giving its consent to an alienation by the grantee under the sannad arbitrarily or to give any reasons for declining to give its consent.

The Crown Grants Act is rather declaratory in its nature than enabling or enacting. It cannot be regarded even as a ratifying Act with retrospective effect, making legal that which was not so.

The Crown Grants Act, as such, is intended to be limited only to grants and transfers subsequent to the passing of the Transfer of Property Act.

Prior to the passing of the Transfer of Property Act there was no doubt whatever as to the power of the Crown to make a transfer of property in any terms, or on any conditions whatsoever.

The grant in question was one made by or on behalf of the Crown.

An estate inalienable in its nature is not an estate unknown to law.

The Crown Grants Act is not *ultra vires* of the Indian Legislature.

Madras Regulation XXV of 1802 is inapplicable to the sannad in question.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada, dated 3rd November, 1920, in O. S. No. 51 of 1918.

*Government Pleader* for appellant.

*Chenchiat* and *Venkataramana Rao* for respondents.

The Court delivered the following

JUDGMENTS:—*Venkatasubba Rao, J.*:—The suit which has led to this appeal relates to a village known as Ravicherla. It was granted to the ancestors of the plaintiffs by a sannad issued by the Government dated the 2nd May, 1843. The grant contains two restrictive clauses one relating to the right of succession which provides that Ravicherla shall be held in perpetuity by the grantees and only such of their heirs could take as the Government might recognise for this purpose from time to time. The second clause, the one with which we are concerned in this appeal, imposes a restriction on the right of alienation, no transfer of the village being valid unless the previous consent of the Government has been obtained authorising such transfer.

The plaintiffs agreed to sell the property and the proposed vendee having regard to the second provision referred to above desired them to obtain the consent of the Government to the sale. The plaintiffs accordingly requested the Government to give consent but the Government declined to do so. The suit was then laid against the Secretary of State and the plaintiffs allege that the village though it was nominally granted by the Government, was really acquired as a result of a family settlement, the Government merely acting as mediators in the matter. The plaintiffs urge that in any event the clause in question imposing a restraint on alienation is void.

The Subordinate Judge agreeing with the plaintiffs gave them a decree and the Secretary of State has filed this appeal.

The following geneology will serve to explain the facts of the case:—

Narayya Appa Rao.

- Venkatanarasimha Appa Rao, married Ramanamma (son by first wife Venkamma).
  - (Nidadavole or Ellore granted)
  - Nariah Appa Rao (adopted) (2nd son of Narasimha Appa Rao).
- Ramachandra Appa Rao (son by 2nd wife Subbamma).
  - (Nuzvid granted)
  - Sobhanadri Appa Rao
- Narasimha Appa Rao (son by 2nd wife Subbamma)
  - Simhadri Appa Rao
  - Nariah Appa Rao (adopted to Venkatanarasimha Appa Rao.)
  - Venkatadri Appa Rao
    - Raja Parthasaradhi Appa Rao (1st plaintiff.)

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Venkatasubba Rao. J.

The first point to be considered is, was the village granted to the plaintiffs' ancestors by the Government or did they acquire it as a result of a family arrangement ?

The facts that have to be considered in connection with this point mark an important epoch in the history of Nuzwid Zamindari.

Prior to 1800 A. D. the Estate had been transferred to Government management and in that year the Government determined to restore the Zamindari and Sannads were issued in 1802 to Venkatanarasimha Appa Rao for the pargannahs in the Ellore Sircar now constituting the Zamindari of Ellore or Niddavole and to Ramachandra Appa Rao for the pargannahs in the Condapalli Sircar now Constituting the Zamindari of Nuzwid. Narasimha Appa Rao, the youngest of the three brothers was then a minor and for some reasons which it is unnecessary to go into his rights were completely overlooked.

This, as might be expected, led to litigation which finally ended in the decree of the Sudder Court in 1819 which upheld the division of the Zamindari in 1802 as an act of State with which the Courts of law would not be justified in interfering. Narasimha then attempted to carry the matter to the Privy Council but his circumstances did not permit him to do so and he at that juncture appealed to the Government.

The Collector, Mr. G. E. Russell, on the 16th of March, 1820 wrote to the Board of Revenue pointing out that it would have been more proper if at the division of the Zamindari a pension had been secured to the claimant and suggesting that the Government might give him some allowance for his maintenance. The Collector also referred to the fact that Narasimha was head and ears in debt and thus observed :—

"That the good intentions of the Government will therefore be frustrated unless anything which they may give him shall be protected from the fangs of his creditors."

The Board of Revenue were averse to adopting the suggestion made by the Collector and the matter had to be finally settled by the Government. Sir Thomas Munro the Governor of Madras strongly felt that the claim of Narasimha was substantially just and that he was deprived of his lawful rights by the action of the subordinate Officers of the Government and that he failed to get adequate relief from the established Courts of Law.

"The Governor in Council" so runs the Government Order, dated the 13th February, 1821, "cannot entertain the idea that it is befitting for the

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Government to look on with passive indifference at a claim like this or at the fate which attends it in Courts of Law."

The Government recognised that though they were under no legal liability they had in the matter a moral responsibility. I feel tempted to quote the very words—

"The Government are answerable for the injury which he has sustained. They are answerable also for the ruin in which, owing to the ambiguity in which they left his claims and to the course which their judicial institutions led him to adopt, he has been involved They are answerable for these wrongs not before a Court of Justice, any more than they would have been if, in consequence of similar oversights, the country had been thrown into disorder and the lives and properties of its inhabitants exposed to hazard. But their responsibility is matter of reason and of conscience and should induce them to do all that is practicable to compensate for the wrongs which have been committed."

The Government having issued this order advised the Collector to prevail upon the Zamindars of Nidadavole and Nuzvid to make a settlement with the claimant and intimated that if they failed to take a reasonable view the Government might be constrained to adopt measures to give effect to what must be presumed to have been their intention at the time of the grant of the sannads.

These events bring us up to 1821 and the material before us is silent as to what transpired between 1821 and 1829.

It would appear that by this time both the estates of Nidadavole and Nuzvid came under the Court of Wards, both Venkata Narasimha and Ramachandra having died. Venkata Narasimha died having adopted Narayya and Ramachandra died leaving an only son Sobhanadri. No settlement was effected and the Government resolved to adopt drastic measures and on the 10th of April 1829 requested the Sudder Court to draft a Regulation revoking the sannads of 1802. Accordingly, Regulation IV of 1829 was passed on the 23rd of June declaring the sannads of 1802 to be void and empowering the Government to issue fresh sannads granting Narasimha a third of the whole estate. The Board of Directors did not approve of the Regulation and its operation was therefore suspended. This takes us to the year 1829.

From 1829 to 1835 there is again a gap, but the crucial events are those that happened subsequent to this period. The facts that have been so far narrated are important only as leading up to the events which I shall now set forth.

The contention of the plaintiff is that Ravicherla fell to his ancestors in a family settlement between the representatives of the three branches, that though the village was acquired

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ostensibly under a grant from the Government, the source of title was in fact not the grant but the family settlement and that therefore the restrictive covenants in the grant are void and of no effect. I shall show that this contention is utterly unfounded. There is not the slightest doubt that Ravicherla was settled upon the plaintiff's ancestors by the Government and that the grant took the final shape of the sannad dated 2nd May, 1843.

Narasimha died and his minor sons Simhadri and Venkatadri had come of age. Narayya and Sobhanadri had also taken possession of their estates of Nidadavole and Nuzwid respectively. In 1835 the then Governor, Sir Frederick Adam, brought his personal influence to bear upon the Zamindars Narayya and Sobhanadri and got them to consent to pay Narasimha's sons Rs. 600 a month for their maintenance. On the 4th February, 1835, two agreements were entered into, one relating to the debt due by Nidadavole to Nuzvid which is for the present irrelevant and the other agreement related to three matters :—

1. There was a debt due by Ramanamma, the widow of Venkata Narasimham, to the Nuzvid estate. Sobhanadri agreed to give this up.

2. Narayya similarly waived his right against Sobhanadri in respect of properties that belonged to Venkamma, the mother of the late Venkata Narasimha.

3. Narayya and Sobhanadri agreed to pay the sons of Narasimha Rs. 600 a month, Rs. 400 to be paid by Narayya and Rs. 200 by Sobhanadri.

To these agreements the two Zamindars alone were parties and though a provision was made in favour of the sons of Narasimha they did not execute the agreements. The documents filed in the case make it very clear that this arrangement was brought about by the direct intervention of His Excellency the Governor (in Ex. F both Narasimha's sons and the Zamindars say that these agreements were entered into "in the presence of the Right Hon'ble the Governor").

So far it will be seen that there was no reference to Ravicherla. Under orders of the Governor, these agreements were on the 6th of February, 1835, sent on to the Collector. In the letter of that date, Ex. D, there is a reference to the fact that the Governor personally expressed to Simhadri Appa Rao his approbation of the provisions made for the benefit of Narasimha Appa Rao's sons. In the reply of the Collector that followed, dated the 4th March, 1835, we find for the first time a reference to Ravicherla. The matter was raised in this way : Narayya by the agreements referred to waived his

rights to the properties of Venkamma in favour of Sobhanadri. Ravicherla was one of the properties that belonged to Venkamma. The Collector asked: Would not the surrender in favour of Sobhanadri enure also for the benefit of the sons of Narasimha? The question was raised and it was left open. Mr. Venkatramana Rao, the learned vakil for the plaintiff, with great resourcefulness and ability argued that this showed that Ravicherla fell as a result of the agreement to Simhadri. But a perusal of the documents will show, as I have said, that this contention is quite unsound. The Collector merely stated what he believed to be the fact and did not speak from personal knowledge. The question regarding Ravicherla was finally settled by the Government Order, dated the 10th November, 1836. It says :—

"The Right Hon'ble the Governor in Council observes that at the time arrangements were made for adjusting the disputes between the Zamindars of Nidadavole and Nuzwid it was distinctly understood and repeatedly explained to them that the Mokhasa village of Ravicherla had lapsed to Government."

I have already pointed out that His Excellency the Governor was personally present and took part in the arrangements and this minute clearly records that it was distinctly understood that Ravicherla was the property of the Government. If this be so Ravicherla could not have passed to Sobhanadri under the arrangements referred to.

The matter is made even clearer by the subsequent proceedings. The sons of Narasimha were sent for by the Collector and they refused to accept the terms offered by Nidadavole and Nuzvid. Some months were thus wasted. They again appeared and expressed their willingness to agree to the terms, provided the Government granted to them for their support three small villages. This was before the minutes of consultation, dated the 10th November, 1836. After the Government had decided that Ravicherla had lapsed to them. the Collector conceived the idea of recommending to the Government the desirability of conferring upon the sons of Narasimha the villages of Ravicherla, Madaca and Roodravaram. Then after a short interval the Collector suggested Sriramavaram in lieu of the villages of Madaca and Roodravaram. These events must be carefully followed in their chronological order. Ex. E, the letter of the Collector, dated the 23rd of May, 1837, sets forth very clearly the facts which I have referred to. I will quote three passages from it.

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"1. The terms on which he grounded his acquiescence were that three small villages might be bestowed upon him for his support on the part of the Government independent of the pension to be granted by his brothers of Nuzwid and Nidadavole.

"2. Shortly after this occurred, the right to the village of Ravicherla became a subject of enquiry and was ultimately assumed and appropriated by Government under their orders, dated 10th November, 1836, and the idea was then awakened of recommending to Government the propriety of conferring it together with the villages of Madaca and Roodravaram upon him.

3. In making this recommendation I am perfectly aware that Simhadri Appa Rao will be indebted to the beneficense of Government solely for it not to any personal or private claim but to the operation of those feelings of sympathy which influences Government in all its acts."

Can there be any doubt after this, that before even the idea of settling Ravicherla came to be conceived, it had been unequivocally declared that the village was the property of the Government?

The matter, however, does not stop here. The two Zamindars as well as the two sons of Narasimha appeared before the Collector in September 1837, that is about four months after the letter of the Collector referred to above. Simhadri gives a writing, dated the 15th September, and Venkatadri, the other son of Narasimha, a writing, dated the 23rd September. Simhadri says :

"It is necessary that I should give my unconditional and unreserved agreement in accepting the said allowances, when your (Collector's) recommendation in my favour would be taken into consideration."

What is the recommendation that is referred to ? It is obviously the grant of Ravicherla and Sriramavaram by the Government. Again Simhadri says :

"I fearlessly accept the terms proposed by the Board........submitting in every respect to such terms alone as Government in their justice may be pleased to extend to me."

Venkatadri in the writing signed by him, agreed to the terms contained in his brother's letter.

The four letters signed by the Zamindars and the sons of Narasimha formed enclosures to the communication of the Collector, dated the 5th October, 1837, to the Board of Revenue. The Collector says :

"I have pledged myself (without which I could not have effected the present arrangement) that Government to mark their satisfaction at the good understanding which has taken place between the brothers will make over to Simhadri Appa Rao the villages of Ravicherla and Sriramavaram alluded to in my former letter under date the 23rd of May, last."

It is impossible to contend in the face of this very clear evidence that Ravicherla was not the property of the Government at the time of the grant.

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I may, however, trace the subsequent history of these negotiations. On the 17th of November, 1837, the Government decided finally to grant these villages to Narasimha's sons (see Ex. G.). The Board directed the Collector to insert in the sannads conferring on them these two villages, a proviso that the lands should not be liable for any of their debts. The Governor-in-Council approved of this suggestion of the Board of Revenue. Simhadri and Venkatadri desired that the exemption should extend also to the allowance agreed to be paid by Nidadavole and Nuzvid. The Officers of the Government could not accede to their wishes because in the words of Ex. IV dated the 20th September, 1838, the allowances "do not immediately emanate from the Government". In the enclosure to Ex. IV Simhadri referred to Ravicherla and Sriramavaram as villages conferred by the Government and requested that the clauses should be inserted in the sannad. The contrast is very marked when he referred to the allowance as payable by Nidadavole and Nuzvid in regard to which also he desired that restrictive clauses should be inserted. It is unnecessary to refer to the further correspondence in the matter. Ex J is the sannad, dated 2nd May, 1843. This refers to the Government Order, dated the 10th November, 1836, by which Ravicherla reverted to the Government. There is further a reference to the arrangement, dated the 4th February, 1835, and it is clearly stated that at that time there was "a distinct understanding and repeated explanations," in pursuance of which Ravicherla lapsed to the Government. This sannad clearly states also that it was the Government that settled the village upon Simhadri and Venkatadri.

There can, therefore, be no doubt that it was by reason of the grant that the ancestors of the plaintiff acquired Ravicherla and that the source of their title is not a family settlement between the representatives of the three branches. The question does not admit of doubt but owing to the very strenuous argument addressed to us on this subject I have dwelt on this point at this length.

This disposes of the question of fact raised in this case. I have come to the conclusion that the Subordinate Judge's finding is wrong and must be reversed.

Then remain the points of law that have been raised and I shall now deal with them.

It is first contended that the restrictive covenant in question is void. This would be so under the general law but

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grants from the Crown are governed by the Crown Grants Act (XV of 1895). Doubts having arisen as to the power of the Crown to impose restrictions upon grants made by it, the Act was passed to remove such doubts.

Section 2 makes the Act have a retrospective effect. It says:

"Nothing in the Transfer of Property Act shall be deemed ever to have applied to any grant heretofore made by or on behalf of Her Majesty the Queen Empress or her heirs or successors; but every such grant shall be construed as if the said Act had not been passed."

Section 3 enacts:

"All restrictions contained in any such grant shall take effect according to their tenour, any rule of law to the contrary notwithstanding."

I am here quoting only the material portions of the sections.

The contention advanced is, that the grant was not made on behalf of the Crown and that the Act will not therefore apply to it. The argument is put in this way. In 1858 the Sovereignty of India was for the first time assumed by Her Majesty, it had previously vested in the East India Company. The grant having been made in 1843, it would not be deemed to have been made on behalf of the Crown. If it had not been made on behalf of the Crown, the Crown Grants Act is inapplicable.

Let me examine if this contention is sound. At the time of the grant, the Charter Act that was in force is that of 1833 (3 & 4 Will. IV, c. 85). I shall first take the preamble. It recites that the East India Company have consented that all their rights in the territories and territorial and commercial assets and property shall be placed at the disposal of the Parliament. It further recites that it is expedient that the territories now under the Government of the said Company be continued under such Government, *but in trust* for the Crown discharged of all claims of the Company to any profit therefrom, to their own use. The first section of the Act gives effect to the intention expressed in the preamble.

If the Government by the East India Company was thus in trust for the Crown of the United Kingdom, does it not follow that the grant made by the Company should be deemed to be on behalf of the Crown? But the plaintiff's learned vakil objects that a trustee does not act "on behalf of" his beneficiary and the act of the East India Company cannot therefore be deemed to be an act on behalf of the Crown. The answer is that the word 'trust' is not used in the Charter

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Act in its strict technical sense and it will be far-fetched to hold that because the word used is "trust," therefore the law of trusts as strictly understood should govern the relations of the Company and the Crown. This could not be the intention of the legislature and I am unable to accept the argument.

In this connection, I may notice another argument advanced by the plaintiff's learned vakil. He contends that under S. 1 of the Charter Act of 1833, what is vested in the Company in trust for His Majesty are "the lands and hereditaments, revenues, rents and profits of the said Company" and not "the territorial acquisitions and revenues". This objection is not in my opinion sound ; even granting it is, it does not avail the plaintiff; for, what was granted, is in any event, the land of the Company.

Is the objection then sound ? I may now glance at the provisions of the earlier and later Charter Acts. In the Act of 1853 (16 & 17 Vic. c. 95) the first section provides that all the territories in the possession and under the Government of the East India Company shall continue under such Government in trust for Her Majesty. The word "continue" is in this connection significant.

The Act of 1858 (21 & 22 Vic. c. 106) refers in similar terms to the government of the territories being vested in the Company in trust for Her Majesty. It is by this Act that the Government is transferred to Her Majesty. The statute makes it clear that the rights previously vested in and exercised by the Company in trust for the Crown, shall thenceforth become vested in and be exercised *in the name of Her Majesty.* This shows beyond all possibility of doubt that it was the Crown that was previously the Sovereign and that the rights were exercised by the Company for the Crown but that subsequent to the passing of the Act the Crown directly exercised those rights and not through the medium of the Company.

The Royal Titles Act of 1876 (39 Vic. c. 10) has been relied on by the plaintiff. It is urged that it refers to a transfer of Government and the word "transfer" implied that the Crown did not previously possess sovereign rights. It is impossible to uphold this contention, for the very section referred to by the plaintiff's learned vakil re-affirms the position that previous to 1858 the Government of India had vested in the East India Company in trust for Her Majesty.

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Now turning to the earlier Charter Act of 1813 (53 Geo. III, c. 155) we find that the sovereignty of the Crown was clearly emphasised and it is affirmed that the territorial acquisitions are under the Government of the Company "without prejudice to the undoubted sovereignty of the Crown".

The view I have taken derives support from the observations of the Judicial Committee in *Secretary of State* v. *Kamatchi Boye Sahaba* (1). At page 531 their Lordships refer to the powers of the East India Company as delegated powers of sovereignty and at page 540 they refer to the Company as the delegate of the British Government.

In *Haji Muhammad Nasur-ud-din Khan Bahadur* v. *Ekambara Mudali* (2) Subramania Aiyar and Benson, JJ. assumed (the question was not raised) that the Crown Grants Act applied to a grant of 1848. In *Sheo Singh* v. *Raghubans Kunwar* (3) there is no discussion but the Act was held to apply to a grant of 1861.

The contention raised is in my opinion unsound and must be rejected.

The next contention of the plaintiff is, that the reference to Her Majesty the Queen in the Crown Grants Act, as "The Queen Empress" indicates that the Legislature intended that the Act should apply only to grants subsequent to 1876 when that title was assumed by Her Majesty. This distinction is too refined and unsubstantial and I cannot possibly accept it. Long previous to the Crown Grants Act, the title of the Queen Empress had become firmly established and it seems unsafe to found an argument on the mere fact that in referring to Her Majesty the words "Queen Empress" are added. It would be both usual and natural to speak of Her Majesty as the Queen Empress and much stronger ground, I should imagine, must be shown, for limiting the scope of the act in the way suggested.

The next contention advanced by the plaintiff's learned Vakil is, that the Crown Grants Act is *ultra vires* of the Indian Legislature.

It is urged that the Crown cannot create an estate unknown to the law and that the estate created by the grant is of this description. Mr. Ananthakrishna Iyer the learned Government Pleader answers that this is not an estate un-

1. (1859) 7 M I A 476. 2. (1906) 2 M L T 55.
3. (1905) I L R 27 A 634: 15 M L J 352 (P C).

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known to ordinary law, and relies upon the passage at page 487 of Vol. VI, Halsbury's Laws of England.

"A grant by the Crown may contain a condition against alienation."

His second answer is, that this estate is in any event not unknown to the Indian Law and in support of this he cites *Gulabdas Jugjivandas* v. *The Collector of Surat* (4). In the view I have taken it is unnecessary to deal with these points. Granting that the Crown cannot create an estate of this kind, the Crown Grants Act expressly confers this power upon the Crown and this leads to the consideration of the question whether the Crown Grants Act is *ultra vires* of the Indian Legislature.

Section 22 of the Indian Councils Act, 1861, enacts that the Governor-General in Council shall have power to make laws for all persons and for all places and things in the Indian Territories. But the plaintiff relies upon the proviso that the Governor-General in Council shall not have the power of making any laws *which may affect the authority of Parliament.* How does the Crown Grants Act affect the authority of the Parliament? The prerogative of the Parliament remains unaffected and notwithstanding the Act, it can create estates unknown to the law. Further, if the Parliament itself could have passed the Statute, why should not the Indian Legislature created by an Act of the Imperial Parliament, have the same power? As observed by their Lordships of the Judicial Committee in *Empress* v. *Burah* (5) the Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and when acting within the limits prescribed, it has plenary powers of legislation, as large, and of the same nature as those of the Parliament itself.

*See* also *Hodge* v. *The Queen* (6) and *Powell* v. *Apollo Candle Co.* (7).

The contention therefore that the Act is *ultra vires*, fails.

It is lastly urged that the sannad contravenes the provisions of S. 8 of Madras Regulation XXV of 1802, which provides that proprietors of land shall be at free liberty to transfer their rights without previous consent of the Government. But this Regulation does not apply, because, in the first place, there was no permanent assessment of the land revenue, no revenue having been imposed at all in regard to this grant; secondly, the Government did not purport to act under the regulation

4. (1878) I L R 3 Bom 186 (P C). 5. (1878) I L R 4 C 172 at 180 (P C).
6. (1883) 9 A C 117 at 132 (P C). 7. (1885) 10 A C 282 at 289 (P C).

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nor was the intention of the parties that the sannad should be issued under it. The fact that the sannad was granted after the date of the Regulation does not necessarily make it a sannad issued under the Regulation. And the mere use of the words "Sannad-i-milkiyat-i-istimrar" does not show that the Regulation governs the sannad. See *Secretary of State* v. *Rajah of Venkatagiri* (8); thirdly, the form of the grant is not that prescribed for sannads under the Regulation. Why should a grant then not made under the Regulation, be by a fiction treated as made under it and why should it be assumed by so treating it, that provisions of the Regulation were deliberately infringed?

I therefore hold that this contention also is untenable.

As I have said in an early part of this judgment, the question that has been raised is in regard to the validity of the covenant imposing a restriction on alienation. No argument has been addressed to us in regard to the other restrictive covenant as no question bearing on it arises in the case and I do not desire (and indeed it is unnecessary to do so) to say anything at present regarding that covenant.

I have now dealt with all the points urged on behalf of the plaintiff. As I have rejected all his contentions, the appeal must be allowed and the suit dismissed with costs throughout.

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*Srinivasa Aiyangar, J.* :—My learned brother and myself have practically heard this appeal twice over and after giving the case my very careful consideration, I have also come to the conclusion that the appeal should be allowed.

The appellant is the Secretary of State for India in Council. He was the defendant in the original suit from which this appeal arises instituted by the present Rajah of Badrachalam and his sons as plaintiffs as owners of a village called Ravicherla and situate in Kistna District. The action was a curious one. The reliefs prayed for were that it should be declared that the plaintiffs were absolutely entitled to the village of Ravicherla and to dispose of the same, that the sannad issued in respect of the said village should be construed and it be declared that cl. 3 of the same is void, illegal and invalid and not binding on the plaintiffs, that even if it were held that the consent of the Government is necessary (for the plaintiffs disposing of the said village), the Government have no right to withhold their consent arbitrarily.

8. (1921) I.L.R. 44 M 864 at 878 and 879: 41 M L J 624 (P C).

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It may be convenient to dispose of the claim put forward in the last of the prayers above referred to. On the face of it, it is merely an alternative prayer and it is to the effect that if the Court should find that cl. 3 is not invalid or illegal and that the same was binding on the plaintiffs, still it should be declared that the Government had no right arbitrarily to refuse to consent to any alienation that may be attempted to be made by the plaintiffs. The suggestion of the plaintiffs with regard to this matter must obviously be that the Government was under some sort of obligation to exercise a proper discretion in according or refusing the permission that might be applied for by the plaintiffs to alienate the property and that in declining to accord such permission as stated in paragraph 8 of the plaint without assigning any reasons the Government acted arbitrarily and therefore illegally. No argument was addressed to us and no grounds advanced or referred to on behalf of the plaintiffs-respondents for establishing that the Government was under any such obligation not to exercise its discretion arbitrarily or that they were bound to give any reasons for declining to accord the permission applied for. The third issue in the case was : "Whether the Government acted arbitrarily in not stating the reasons in refusing sanction for the alienation and if so what is the effect thereof." This issue was found against the plaintiffs by the Lower Court, and that finding was not attacked in the argument before us. The Subordinate Judge, however, found the other issues in the case in favour of the plaintiffs and granted a decree declaring the right of the plaintiffs to alienate the property without any previous permission of the Government. It is against this decree that the appeal has been filed on behalf of the defendant, the Secretary of State for India.

I have found some difficulty in understanding the judgment of the learned Subordinate Judge in the Court below. In paragraph 12 of his judgment he states thus : "If the grant is to be considered as having been made by the Government, there is nothing illegal or invalid or void and inoperative in the conditons imposed by the Government." This view would seem to be qualified by him in the next paragraph of his judgment where he states thus : "The village of Ravicherla was held under Sarva Mukhasa tenure by Venkamma. The mere resumption of that village by Government cannot alter its nature. In the hands of the Government it was an absolute estate (one on an absolute) and permanent tenure.

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It was made over to the plaintiff's ancestors under Ex. J and the restrictions imposed were intended as a cloak to shield the properties from the fangs of the creditors at the time but not to limit the nature of the estate given over. The plaintiffs hold the village on an absolute permanent tenure."

Two arguments would seem to be indicated in the above extract from the learned Subordinate Judge's judgment and these are (1) because the village had been granted on Sarva Mukhasa tenure, even in the hands of the Government the village was only Sarva Mukhasa and the Government had no right to re-grant it to any other person except as a Sarva Mukhasa, that is to say, according to the Subordinate Judge, on an absolute and permanent tenure, and (2) that the condition in respect of alienation was not really intended to be operative as between the grantors and the grantees but was intended to be merely a cloak to shield the properties from the fangs of the creditors. There are obvious difficulties in the way of accepting either of these views. In fact I did not understand the learned vakil for the respondents to argue for either of these two positions. There is absolutely no warrant for supposing that even after resumption any conditions or characteristics of the tenure on which it had been previously granted continue attached to any property. And I further fail to see on what grounds the learned Subordinate Judge supposes that even after resumption the absolute owner of property, as he recognised the Government of the day to be, had no right to make a fresh grant of the property to some other person on a different tenure or on terms and conditions different to the previous grant. Sarva Mukhasa tenure is supposed by the learned Subordinate Judge to be absolute property, but apparently it was of a resumable nature. I can see no principle or reason for any of the suppositions made by the learned Subordinate Judge with regard to this aspect of the case. As to the second point above referred to, the view that the learned Subordinate Judge took would appear to be that cl. 3 in the sannad restraining alienation by the grantee except with the permission previously obtained from the Government was not really intended to be operative as between the parties to the grant and was to be in the grant merely as a cloak to save the property from the fangs of the creditors. It is one thing to say that a particular clause in a document was put in with the object or purpose of

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saving the property from the fangs of creditors and another altogether to say that it was never intended to be operative or binding between the parties. Assuming that a condition was inserted in a grant with a particular object it does not follow that the condition is valid or operative only to the extent of securing or subserving the particular object had in view. It cannot be open to parties to a document to contend that in spite of the clear terms of a particular clause in a document such clear terms should be allowed to be controlled or modified by the avowed object with which the clause was inserted. It is no doubt true that the clause appears to have been inserted in the sannad with the primary object of saving the property from the creditors of the grantees; but the restriction imposed was not that it was incapable of being taken, sold or otherwise dealt with in execution of a decree or at the instance of creditors but that the grantees should have no power to alienate the property. It is therefore clear that what was done was to secure the intended object only by restraining the power of voluntary alienation by the grantees and obviously therefore to protect the property not only from the creditors but to protect the grantees against themselves. In these circumstances I cannot agree with the learned Subordinate Judge that the clause was not intended to be operative as between the grantors and the grantees.

As regards the theory of the clause being a mere cloak, I must take it that what the learned Subordinate Judge means is that the clause being void and inoperative was intended merely as a cloak, that is, as something calculated and designed to conceal the truth, namely, the real alienability of the subject-matter of the grant. It is only therefore, if, as a matter of fact, the clause restraining alienation was invalid and the subject of the grant was really alienable that the explanation of the clause as a cloak woud be of any value. The main question therefore for determination in this appeal is whether the condition against alienation contained in cl. 3 of the sannad is valid and binding on the grantees and this indeed was the question with regard to which the learned vakil for the respondents addressed all his argument. It was put in two ways. The first contention might not inaccurately be described as an argument on the facts. It was said that though there was a formal sannad given by the United East India Company, the Government for the time being, to the grantees, the ancestors of the plaintiffs, still the plaintiffs' ancestors did not obtain

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the property under or by virtue of the grant but the property was either their own and if not was obtained by them as the result of a family agreement made by and between their branch and the other branches of their family. Very able and ingenious was the argument advanced by the learned vakil for the respondents on this aspect of the case. The contention itself is formulated by the plaintiffs in paragraphs 4 and 5 of their plaint in the following terms :—

"Sree Raja Venkatadri Appa Rao Bahadur and Sree Raja Simhadri Appa Rao Bahadur the father and uncle respectively of the first plaintiff herein were entitled to a share in the Nuzwid Zamindari. At the original partition of the said estate which took place in or about 1770 they were excluded by mistake. The first plaintiff's father and uncle pressed their claims to the said Zamindari. The then Government of Madras interceded and in or about 1835 a settlement was arrived at and in and by which it was *inter alia* agreed that the village of Ravicherla should be granted to the plaintiffs' father and uncle on an absolute and permanent tenure. In pursuance of the said settlement in or about 1840 the said village was granted to the first plaintiff's father and uncle on an absolute and permanent tenure and put in their possession. Three years thereafter in or about 2nd May, 1843, a sannad, one *milkiet-istimrar* was granted in respect of the said property."

The real import of this contention is, I take it to be, that the plaintiffs' family obtained the property not from the Government, that the Government had not the property in them to give it away, that it was property which was at any rate in the order and disposal of the other branch of the plaintiffs' family, and that the plaintiffs' branch of the family obtained it not as the result of any grant by the Government but as the result of a family arrangement between the different branches of their family, and that therefore the sannad which was granted in respect of the village of Ravicherla subsequently by the Government and accepted by the plaintiffs' branch of the family was not the real source of the plaintiffs' title to the property was a mere sham deed and should not be looked to for the purpose of determining the plaintiffs' rights. If on the facts I should have been disposed to agree with the contention, it might become necessary to consider whether assuming that the plaintiffs' predecessors obtained the property as the result of a family arrangement between them and the other branches of their family, still, the acceptance by them of the sannad in question from the Government could affect their rights to the village and if so in what manner and to what extent, and whether in that view the clause in question would or would not be binding on them. But in my view,

it is unnecessary to consider that question because after a careful consideration of all the documentary evidence in the case, that is to say the only evidence before us, it is clear that even on the facts the contention put forward on behalf of the plaintiffs-respondents could not be accepted. For some reason into which for the purpose of this appeal it is unnecessary to enquire, the NuzvidZamindari was at the time of the permanent settlement early in the last century settled by the then Government not on all the branches of the family but on two of its branches alone excluding the branch to which the plaintiffs belonged. In consequence of this the plaintiffs' branch of the family launched on a protracted but unsuccessful litigation for the purpose of recovering from the other branches of their family their share or alleged share in the Zamindari. After however all this litigation was over, it appears to have been realised by some of the authorities of the Government at the time that the original settlement of the Zamindari to the exclusion of the plaintiffs' branch of the family was due to some mistake and that something should be done to repair the injustice if only in consideration of the helpless condition in which the plaintiffs' branch of the family then was. We thus find in Ex. III that Mr. Russell, Collector of Masulipatam at the time, addresses the Board of Revenue in the following terms :—

"Throughout the whole of the correspondence which passed on this subject there does not appear to be the slightest trace of it ever having been proposed or intended, to grant a part of the lands to the petitioner; and I confess it seems to me that the only possible blame which the Government can take to themselves for the manner in which they disposed of the country is the omission to secure the petitioner a pension similar to those assigned to some others who were in like situations. That this omission has involved him in great distress is certain and it is no less true that he now established denial of his having had any hereditary right to the lands must for ever preclude him from obtaining relief from his brothers by declaring the Zamindari to have been acquired by them. Under these circumstances, therefore, and more particularly as my official situation rendered it my duty to oppose his claim in its progress through the Courts, I shall feel happy if my present address should be the means of inducing the Government to give him some allowance for his maintenance. But I should not omit to mention that the facility with which the unfortunate decree of the Provincial Court enabled him to borrow money has plunged him over head and ears in debt to persons who hoped to profit by his obtaining a share of the country and that the good intentions of the Government will therefore be frustrated unless anything which they may give him shall be protected from the fangs of his creditors."

The Board of Revenue, however, as will be seen in Ex. II, did not take a favourable view of the recommendations of

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the Collector because they still believed that though not in the Zamindari yet in the other properties of the joint family the plaintiffs' branch might have a right and that in any case to seek to make a provision for the plaintiffs' branch of the family might constitute a dangerous precedent with respect to the members of Zamindari families all over the country. But the Governor in Council at the time would appear to have taken a refreshingly humane view of the situation as will be seen at the concluding portion of Ex. A where the following passage appears :—

"The Governor in Council cannot entertain the idea that it is befitting for the Government to look on with passive indifference at a claim like this or at the fate which attends it in Courts of Law. It is not sufficient for the Government that, in the manner of restoring the Zamindari they exercise a discretion which nobody had power to question, that no law has been infringed in the treatment which Narasima Appa Rao has met with, and that, if he had received better legal advice, the ruin in which he has been involved might have been less complete. The Government must not merely let the law take its course, but must exercise a paternal care over the people. It has to preserve their affections as well as its own authority. In reviewing the circumstances of the case under consideration, it appears clearly that Narasimha Appa Rao has been cut off from the provision to which he had an equitable claim. The Government are answerable for the injury which he has sustained. They are also answerable for the ruin in which, owing to the ambiguity in which they left his claims and to the course which their judicial institution led him to adopt, he has been involved. They are answerable for these wrongs, not before a Court of Justice, any more than they would have been if, in consequence of similar oversights, the country had been thrown into disorder and the lives and property of its inhabitants exposed to hazard. But their responsibility is matter of reason and of conscience and should induce them to do all that is practicable to compensate for the wrongs which have been committed. Whether fresh legal proceedings should be instituted is a question of prudence to be determined according to their probable result. But the Governor in Council trusts that the necessity of legal proceedings may be suspended by the influence of the Collector. If out of the revenues of the Zamindari an adequate provision is made for the future support of Narasimha Appa Rao, and a composition effected with his creditors, the further interference of the Government will not be required. But if the Zamindar be advised to rest secure in the terms of the Government grant, it will then remain to be considered what measures will be most advisable with the view of giving effect to what must be presumed to have been the intentions of the Government when that grant was made."

In Ex. A-1 the Government asked the Collector of Masulipatam to point out that both in honesty and in law at least a proper maintenance should be settled on the plaintiffs' branch of the family and asked the Collector to explain these sentiments of the Government to the Zamindar and express the anxious hope of the Government that he should lose no time in proposing such effectual relief as may remove from the

plaintiffs' branch of the family the distress they were in." This was in February, 1921. But apparently the Collector was not able to achieve anything by persuasion and we find from Ex. B that the Government finding themselves unable to bring the Zamindars to any reasonable settlement required the Judges to suggest ways and means of setting right the injustice perpetrated at the time of the permanent settlement, and thereupon steps were taken for making and approving of a draft regulation respecting the Nuzvid Zamindari to set aside the inequitable division at the time of the permanent settlement and to bring about another settlement giving a share to the plaintiffs' branch of the family. This draft regulation is Ex. C-1. Though this was got ready about June, 1921, in September following the other council would appear to have prevailed and the Government asked the Board of Revenue in Ex. C-3 that no measures be taken for carrying into effect the proposed regulation.

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It was after this as may safely be surmised from Exs. VII and D that the Governor of Madras some time early in the year 1836 personally settled all the disputes and differences between the various branches of the family and persuaded the other two branches of the family to confer a pension for maintenance of a sum of Rs. 600 per mensem on the plaintiffs' branch of the family. (*See* Ex. D-1). The point in this discussion with regard to this pension is that it was refused to be accepted by the plaintiffs' branch of the family at first and as a condition for accepting the same they stipulated for a grant to them of three small villages from the Government independent of the pension to be granted by their brothers of Nuzvid and Nidadavole. (*See* Ex. E). In Ex. F bearing date the 16th day of October, 1837, the Collector of Masulipatam, addressing the Board of Revenue, states that he could not have persuaded the plaintiffs' branch of the family to accept the arrangement regarding the pension without pledging himself that the Government, to mark their satisfaction at the good understanding which has taken place between the brothers, will make over to Simhadri Appa Rao the two villages of Ravicherla and Sreeramavaram. It is also significant that in the documents obtained by the Collector from the other two branches of the family with regard to their final undertaking of the obligation to pay the pension agreed to, there is not the slightest reference to the village of Ravicherla or the settlement of the same on the plaintiffs' branch of the

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family. From the terms of Ex. VII it is abundantly clear that even at the time of the original settlement of the disputes and differences between the various branches of the family it was distinctly understood and repeatedly explained to the Zamindars of Nidadavole and Nuzvid that the Mukhasa village of Ravicherla had lapsed to the Government, and that it had been even prior to that date attached by the Collector, as being the property of the Government.

Ex. G speaks of the sannads to be granted by the Government with respect to the villages of Ravicherla and Sreeramavaram as conferring the villages on Simhadri Appa Rao. Again in the Arzee, dated 17th August, 1838, submitted by Rajah Simhadri Appa Rao Bahadur to the Collector of Masulipatam he speaks of the cowle to be granted to him for the villages of Ravicherla and Sreeramavaram conferred on him by the Government. Again later on in the same document he states as follows with reference to the contemplated provision regarding the preventing of alienation of property :—

"The provision which the Hon'ble Government have thought proper to make in the cowle that the above villages are not to be liable for sale on account of the debts contracted by my father Rajah Narasimha Appa Rao and myself prior to the date of the grant, will secure to me the villages benevolently conferred by Government for my permanent subsistence in consideration of the distressed condition of my family."

It is also significant that one of the provisions finally agreed to be inserted in the sannad as the result of the negotiations between the plaintiffs' family and the Government was that the succession to the village should devolve upon such of the heirs of the present grantees as the Government may determine after their death. [*See* Exs. V and H].

Again in Ex. J the sannad in respect of the suit village, the recitals contained in clear terms a reference to the village of Ravicherla having reverted to the Government.

All this mass of documentary evidence makes it abundantly clear that the village of Ravicherla was dealt with at the time of the sannad as property which had reverted to the Government and become vested in it, so as to be capable of being disposed of by the Government at their pleasure. When the question arises as regards the ownership of property in some ancient period the evidence afforded by such unimpeachable ancient documents should, it seems to me, be accepted beyond question. I may indeed go further and state that the language of most of these documents is absolutely inconsistent with

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the contention put forward on behalf of the respondents that the village of Ravicherla did not belong to the Government but was the property which still at the time of the grant vested in the other branches of the family and that all the documents including the sannad were elaborate devises for the purpose of effecting curious camouflage and making it appear that the property belonged to the Government in order that they may insert in the sannad restrictive provisions regarding the inheritance to and the disposal of the village. I am further satisfied that if what was intended was such an elaborate device the language used would have been entirely different to that employed in the documents. I feel, therefore, bound to reject the contention that the village of Ravicherla was not a grant to the plaintiffs' family by the Government and that the plaintiffs' family acquired the property not as the result of any such grant from the Government but as the result of a family arrangement with the other members of the family. I also fail to see how, if indeed all the parties at the time agreed to the village of Ravicherla being treated as the property of the Government for the purpose of its being granted on the terms set out in the sannad to the plaintiffs' family, it could now be contended that there was no such title in the Government to impose any such conditions. However, as I have already observed, it is unnecessary, in view of the decision I have arrived at, that the grant was by the Government itself, which had the property vested in it at the time so as to enable it to make the grant, that there should be any further consideration of the legal effect of the plaintiffs' family having accepted a sannad in respect of the village from the Government and having purported to continue to hold it under the terms of the sannad till the other day when they applied to the Government for permission to alienate the property, a permission which was refused.

But this conclusion does not dispose of the case, because it is only a conclusion with regard to what may be said to be the argument based on facts. But assuming that the sannad should be deemed or regarded as the source of the plaintiffs' title to the village in question and that therefore the nature and extent of the rights with regard to the prayers in the plaint should be determined by the sannad itself and the terms therein set out, the contentions were even more ingenious and strenuous which were put forward by the learned vakil for

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the plaintiffs to establish that the plaintiffs' right to the village should be adjudged to be absolute and untrammelled by any conditions.

The first argument had reference to the Crown Grants Act (XV of 1895). It was not in its true nature so much an argument as an answer by way of anticipation. The learned vakil for the plaintiffs assumed that for the defendant the Crown Grants Act will be referred to and relied upon as enabling or justifying the alienation and began by assailing it *in limine*. But looking at the preamble and considering the purpose of the Act it cannot be doubted that the Act was rather declaratory in its nature than enabling or enacting. It had to be enacted, so says the preamble, because doubts have arisen as to the extent and operation of the Transfer of Property Act of 1882. Prior to the Transfer of Property Act, there was no statutory enactment of the Indian Legislature regulating transfers of property. But after that Act was passed apparenly doubts came to be expressed or entertained whether that was an Act governing transfers of property by act of parties whom subjects of Crown or whether the provisions of the Act applied also to transfers of property by the Crown. Taking the terms of the Crown Grants Act, the inference seems to be irresistible that prior to the Transfer of Property Act there was no doubt whatever as to the power of the Crown to make a transfer of property in any terms, or under any of the conditions whatsoever. Apart from one argument which shall be referred to hereafter, the learned vakil for the plaintiffs did not refer to any limitations on the power of the Crown to create or transfer estates previous to the passing of the Transfer of Property Act. The personal law of the Hindus or Mahomedans or other communities in India could not possibly affect the rights of the Christian Sovereign power. If all acts of Legislature owe their origin to the Sovereign power, whatever that may be, in the absence of clear indication to the contrary, the provisions of statutory law should be regarded as governing transactions only of the subjects of the sovereign power and not of the sovereign power itself. Further, the rules of law, whether statutory or otherwise, governing and regulating transfers of property as between subject and subject of the sovereign power, are based or should be deemed to be based on principles which cannot in any wise be regarded as applicable to a transfer by the sovereign power itself.

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As I read Crown Grants Act it became necessary for the Legislature to pass such an Act altogether declaratory in its nature, merely because of the doubts which came to be entertained after the passing of the Transfer of Property Act. The meaning and significance of Crown Grants Act of 1895 is merely a re-statement of the principle underlying S. 3 thereof, namely, that the Crown is entitled to impose any restrictions, conditions or limitations over, whatsoever, in any grant or transfer it may make whether such restrictions, conditions or limitations over, would be legal or valid or not in any grant or transfer made by one subject to another, and it became necessary for the Legislature to re-state and re-affirm the principle only because of the doubts that arose subsequent to the passing of the Transfer of Property Act. I cannot, therefore regard the Crown Grants Act as an enacting or enabling measure of the Legislature or even as a ratifying Act with retrospective effect making legal that which was not so. An explanatory and declaratory Act cannot be regarded or construed as if it were an enactment creative or regulative of rights or obligations. It seems to me therefore unnecessary to deal in detail with the very long and learned argument addressed to us for the plaintiffs with special reference to the Crown Grants Act. I am satisfied that the sannad in this case which was a grant by the State or Sovereign authority would be binding according to its tenor. I shall therefore merely refer briefly to the other contentions of the learned vakil for the plaintiffs. His first contention was that S. 3 providing for Crown grants taking effect according to their tenor refers merely to such grant or transfer as aforesaid, and therefore refers back to S. 2 and is confined in its operation to a grant or transfer heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, her heirs or successors or on behalf of the Secretary of State for India in Council. The Secretary of State for India in Council came into being only on the assumption, by Her Majesty Queen Victoria, of the Government of India in 1858 and the title of Empress of India was conferred on Her Majesty only in 1876 and the arguments founded thereon was that therefore the grants and transfers of property to which the Act is applicable are only grants and transfers made subsequent to 1858 or 1876. But I have already come to the conclusion that the Act, as such, is intended to be limited only to grants and transfers subsequent to the passing of the Transfer of Property

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Act. When S. 2 lays down that nothing in the Transfer of Property Act shall apply or be deemed to have applied to any grant or transfer made before 1895 or to be made after 1895 I cannot regard the Act as intended to apply to the construction of any grant made previous to the year 1882. But at the same time I cannot accept the argument of the learned vakil for the plaintiffs that merely because the expression used is "Queen Empress" and that title was conferred on Her Majesty only in 1876 the Act must on that ground be confined in its operation only to grants or transfers made subsequent to 1876. The mere fact that a person is referred to in a document, albeit a statute of the Legislature, by his or her present title seems to me to be no reason, apart from the context, to hold that a limitation or definition of the time is thereby introduced impliedly, by referring only to the period of time subsequent to the adoption or conferring of the title and there seems also no reason for supposing that the expression was not used merely to indicate merely the sovereign bearing the title.

The next contention for the plaintiffs was that previous to the assumption of the sovereignty of India by the Crown in 1858 the sovereignty was in the United East India Company and that therefore the grant which was made in the year 1843 under the sannad issued by the Company, could not be regarded as a grant by or even on behalf of the Crown. This contention has been to my mind conclusively answered by the learned Government Pleader who appeared for the Secretary of State. The Parliamentary Act, 3 & 4 Will. IV, c. 85, both in the preamble and in S. 1, provides and declares that the territories, revenues, etc., of India in the possession and under the Government of the Company shall remain and be vested in the Company in trust for His Majesty and even in the Government of India Act, 1853, similar words were used. In *Gibson v. The United East India Company* (9) the general principle of law is referred to that all conquests made by subjects necessarily belong to the Crown and in the case of *The Advoacte-General v. Richmond* (10) it is pointed out that the vesting of the territories and revenues in the United East India Company is in trust for His Majesty for the service of the Government of India. See also *The Secretary of State for India v. Kamachee Boye Sahaba* (1). It seems to me unnecessary to

1. (1859) 7 M I A 476 at 541.

9. 5 Bing. (N C) 260. 10. Perry's (O C) 516 at 576.

refer to all the cases that have been cited at the bar in connection with this question, because the terms of the statute are to my mind perfectly clear.

It was also argued by the learned vakil for the plaintiffs that even assuming that the Government of the country was carried on by the Company in trust for Her Majesty it does not follow that the grant was a grant made on behalf of Her Majesty. The contention was that the expression "on behalf of" imports some sort of agency and that it cannot be said that a grant by a trustee is on behalf of the beneficiary. I cannot possibly agree with such a contention, and having regard to the context in which the terms have been used, I feel no difficulty whatever in holding that when a grant is made by an agency exercising delegated sovereign power the grant is properly described as made on behalf of the supreme sovereign power. The next argument advanced on behalf of the plaintiffs was not on the construction of the Crown Grants Act but with regard to the entire Act on the footing that the Act itself was *ultra vires* of the Indian Legislature. It was said that under the English Common Law the Crown cannot create an estate unknown to law. It may well be asked, unknown to which law? Is it the Common Law of England or India or the Statute Law of England or this country, and what is the meaning of the expression "estate unknown to law". An estate inalienable in its nature is not an estate unknown to law. But after all I fail to see, how, assuming for the purpose of argument that the contention is well founded that the Crown cannot create an estate unknown to law, that makes the Crown Grants Act *ultra vires*. The Indian Legislature is, while legislating within the limits imposed by Parliament, in the same position as an independent and absolute legislature. Under S. 22 of the Indian Councils Act, 24 and 25 Vic. c. 67, the Governor-General in Council is empowered to make laws for all persons and for all things whatever. There is, however, in that section a proviso, that the Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of that act and certain other acts therein referred or which may affect the authority of Parliament, or the constitution and rights of the East India Company or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any

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person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories.

Mr. Venkatramana Rao's argument, if I understand him rightly, was to the effect that it was part of the common law, of the United Kingdom of Great Britain and Ireland that the Crown cannot create an estate unknown to law and the said proviso forbids the Governor-General in Council from making any law which will affect any part of the unwritten laws or constitution of the United Kingdom of Great Britain. But he omitted from consideration altogether the qualifying clause beginning with the words "whereon may depend in any degree the allegiance of any person, etc." I am unable therefore to accept the argument that the Crown Grants Act should be regarded as *ultra vires* for the reason that it enables the Crown to create an estate unknown to the law.

A further contention was also advanced to the effect that the Crown Grants Act was *ultra vires* also because it was calculated to affect the authority of the Parliament. I must confess I was unable to understand the argument of the learned vakil with regard to this contention. I cannot even imagine how assuming that the act enables the Crown to create an estate unknown to the law the authority of the Parliament is thereby affected.

For all these reasons I have no hesitation in rejecting the contention of the learned vakil for the plaintiffs-respondents that the Crown Grants Act is *ultra vires* of the Indian Legislature. But after all in the view I have taken, that the Crown Grants Act is not an enacting or enabling measure but, for which the Crown could not make a particular kind of grant but is only an explanatory and declaratory act and in terms refers only to grants made subsequent to 1882, it seems to me futile to examine more minutely the contention that it is *ultra vires*.

Te learned vakil for the plaintiffs has not shown how otherwise the grant in this case should be regarded as void or illegal or not binding on the plaintiffs.

There is only one other contention on behalf of the plaintiffs, which remains to be noticed, and that is the argument based on S. VIII of Regulation XXV of the Madras Regulations. Under that section it is provided as follows:

"Proprietors of land shall be at free liberty to transfer. without the previous consent of the Government, or of any other authority, to whomsoever they

may think proper, by sale, gift, or otherwise, their proprietary right in the whole, or in any part of their Zamindaries."

But this section and the act itself apply only to lands for the revenue payable to the Government in respect of which an assessment is permanently fixed. In the case before us no such permanent assessment is fixed or made payable to the Government under the sannad. This argument also therefore fails.

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In the result I agree with my learned brother in the conclusion that the judgment of the Lower Court cannot be sustained and that therefore the appeal should be allowed and the plaintiffs' suit dismissed with costs both in this Court and in the Court below.

A. S. V. *Appeal allowed and suit dismissed.*

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